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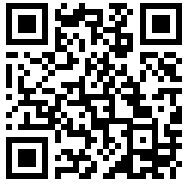

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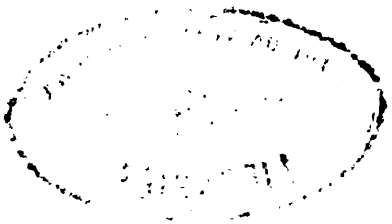

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OFFICIAL OPINIONS

OF

THE ATTORNEYS GENERAL

OF

THE UNITED STATES,

ADVISING THE

PRESIDENT AND HEADS OF DEPARTMENTS

IN RELATION TO THEIR OFFICIAL DUTIES,

AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN GOVERNMENTS AND WITH INDIAN TRIBES, AND THE PUBLIC LAWS OF THE COUNTRY.

EDITED BY

J. HUBLEY ASHTON.

VOLUME XII.

[PUBLISHED BY AUTHORITY OF CONGRESS.]

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VOLUME XII.

CONTAINING

THE OPINIONS

OF

HON. HENRY STANBERY,

OF OHIO.

HON. O. H. BROWNING,

OF ILLINOIS.

HON. WM. M. EVARTS.

OF NEW YORK.

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OPINIONS

OF

HON. HENRY STANBERY, OF OHIO:

APPOINTED JULY 24, 1866.

NOTARIAL POWERS OF AMERICAN CONSULS.

1. No law or regulation requires an American consul to certify to the official character and acts of a foreign notary public.
2. Consuls of the United States are authorized, by the 24th section of the act of August 18, 1856, to perform any notarial acts; but a certificate as to the official character of foreign notary is not a notarial act.

ATTORNEY GENERAL'S OFFICE,
August 1, 1866.

SIR: I have received your letter of the 24th ultimo, with its enclosures.

It appears that a power of attorney, purporting to be executed at Liverpool, by Edward Lawrence, and acknowledged before a notary public at Liverpool, has been presented to Mr. Dudley, our consul at that place, for his official certificate, that the notary public was duly authorized, admitted, and sworn, and that full faith and credit are due to his notarial acts. Mr. Dudley states that this power of attorney has relation to property acquired during the war, in violation of the proclamations of the President and acts of Congress, and by parties who were actively engaged in running the blockade. Under these circumstances, Mr. Dudley has doubts as to whether he ought to verify the paper; and you ask my opinion upon this question, and whether you may lawfully instruct Mr. Dudley to withhold his verification. I do not find that there is any law or regulation which compels a consul to give

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such a certificate as that in question, even in aid of a lawful purpose. The 24th section of the act to regulate the diplomatic and consular system of the United States, approved August 18, 1856, (11 Stats., 60,) authorizes any consular officer to perform any notarial act or acts, such as any notary public is required or authorized by law to do or perform within the States. The certificate in question does not fall within the functions of a notary; and besides, if it were a notarial act, the duty is not imperative. The 22d section of the same act vests the President with authority to give such orders and instructions to all diplomatic and consular officers, touching the transaction of their business, as may not be inconsistent with the Constitution or any law of the United States. I am, therefore, of opinion, that you may lawfully instruct the consul not to verify this paper.

I am, sir, very respectfully,
Your obedient servant,

HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

THE METEOR.

When a court of the United States, in the exercise of its discretion, has advisedly determined to permit a vessel libelled for violation of the neutrality laws to be released on bond, the executive department has no power or duty to interfere with the proceedings.

ATTORNEY GENERAL'S OFFICE,
August 4, 1866.

SIR: I received yesterday your letter of the 1st instant, enclosing a copy of a note of the 21st ultimo, addressed to you by the minister of Spain, relative to the proceedings of the District Court at New York in the case of the "Meteor."

The question you ask is, Whether it is expedient or necessary to interfere with those proceedings? I reply by

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saying that the Constitution and laws have committed to the tribunal of the district court exclusive original jurisdiction of the case, and do expressly prohibit the executive department of the Government from interfering with that tribunal in the exercise of such jurisdiction.

The Government, through its counsel, had the right to oppose before the court the granting of the claimant's application to bond the vessel after condemnation. This right was duly exercised. The district attorney was instructed by this office not to give consent thereto, and the instruction was, I am advised, obeyed. But when the court, in the exercise of the discretion vested in it by the law, decided in favor of the application, and ordered the release of the vessel, on stipulation filed, all opportunity, as well as all right, on the part of the Government to object or resist terminated.

In respect to the value of the vessel, and the amount of the bond to be accepted as substitute for her, that was a matter also within the jurisdiction of the court, to be decided according to the evidence submitted. It appears by the note of Mr. Tassara that the valuation and report of the appraisers were contested in court, and counter-affidavits submitted. It is to be presumed that the court considered the question in the light of all the evidence adduced on the part of the libellant and of the claimants, and that its decision was correct. But whether its decision was right or wrong, no executive officer has power to review or resist it.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. WM. H. SEWARD,

Secretary of State.

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RESTORATION OF DISMISSED MILITARY AND NAVAL OFFICERS.

The 12th section of the act of March 3, 1865, providing, in certain contingencies, for the restoration of an officer dismissed from the military or naval service, is constitutional, under the fourteenth clause of section 8 of article I of the Constitution of the United States.

ATTORNEY GENERAL'S OFFICE,
August 6, 1866.

SIR: By your letter of the 30th June, you submitted for the consideration of my predecessor the 12th section of the act approved March 3, 1865, "to amend the several acts heretofore passed to provide for the enrolling and calling out of the national forces," &c. (13 Stats., 489.)

The questions you propound upon the section are, Whether it is constitutional, and, if so, whether it is imperative?

The section is as follows:

"In case any officer of the military or naval service, who may be hereafter dismissed by authority of the President, shall make an application in writing for a trial, setting forth under oath that he has been wrongfully dismissed, the President shall, as soon as the necessities of the public service may permit, convene a court-martial to try such officer on the charges on which he was dismissed. And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within six months from the presentation of the application for trial, the sentence of dismissal shall be void."

I am of opinion that this section is constitutional and imperative. It falls within the power conferred on Congress, by the fourteenth clause of section 8 of article I of the Constitution, "to make rules for the government and regulation of the land and naval forces." It does not seem to me obnoxious to the objection that it invades or frustrates the power of the President to dismiss an officer. On the con-

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trary, it proceeds upon an admission that the power of dismissal belongs to the President. It is simply a regulation which is to follow a dismissal, providing, in certain contingencies, for the restoration of the officer to the service, and leaving the dismissal in full force if those contingencies do not happen.

As to the consequences which you suggest may follow upon carrying this section into effect, and the questions which may then arise, I have only to say now, that any opinion upon them at this time would be premature. So far as they properly enter into the question of the constitutionality of the section I have considered them, and do not find that they operate against the conclusion stated.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. GIDEON WELLES,

Secretary of the Navy.

INHERITANCE BY ALIEN NETHERLANDERS.

1. It seems that there is no existing treaty stipulation between the United States and the Netherlanders on the subject of the rights by inheritance of children of a deceased child of a Netherlander dying intestate in the United States.
2. In this absence of treaty stipulation, the subject-matter is regulated by the laws of the respective States, and they, as a general rule, recognize the children of a deceased child as entitled to represent their deceased parent in the share which he would have taken from the intestate if such deceased parent had survived the intestate, the descent being *per stirpes*, and not *per capita*.

ATTORNEY GENERAL'S OFFICE,

August 8, 1866.

SIR: I have the honor to reply to your note of the 20th ultimo, addressed to my predecessor, requesting an answer to the following question, propounded by Mr. Van Limburg: "Whether, and to what extent, Netherlanders can inherit *ab intestato* in the United States, when they are, in

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relation to the deceased, children of a son who had died before him?"

I do not find any treaty stipulation between the Netherlands and the United States upon this subject, except a section of a treaty of early date, which seems only applicable to personalty, and is perhaps superseded by later treaties.

It is, therefore, a subject-matter belonging to the States respectively; and as the laws of the respective States differ in many particulars as to the rights of aliens and the course and rules of descent, it would be a great, and I suppose unnecessary, labor to go through all this legislation, so as to answer the question in detail for every one of the States, when perhaps the actual case which gives rise to the question depends on the laws of a single State. This much, however, I feel at liberty to say upon the question at large, that the policy of our States generally in respect to aliens in the matter of descent and inheritance is liberal, and that the usual rule—so far as my observation goes, the uniform rule—is to recognize the children of a deceased child as entitled to represent their deceased parent in the share which the deceased parent would have taken from the intestate if such deceased parent had survived the intestate, the descent being *per stirpes*, and not *per capita*.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

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CASE OF MADAME BERTHEMY.

This lady was born in France. Her father, at the time of her birth, was a citizen of the United States. She married in France a French citizen, and continued after the death of her husband to reside in the country of her nativity. *Held*, that she is a citizen of France, and not of the United States.

ATTORNEY GENERAL'S OFFICE,
August 13, 1866.

SIR: The only question, as I understand, intended to be referred to me in the case of Madame Berthemy is, whether that lady is a citizen of the United States or of France? The facts of the case, I assume, are, that she was born in France; that her father was, at the time of her birth, a citizen of the United States; that she married in France a French subject or citizen; that she never contracted a second marriage, and is at the present time a widow; and, finally, that she is now, and has been always, domiciled in the country of her nativity.

Whatever uncertainty may have existed anterior to the statute of February 10, 1855, in regard to the actual legal condition, in respect of nationality, of persons born beyond the jurisdiction and limits of the United States of American parents, that statute, it is clear, naturalized all persons born, before as well as after its passage, in foreign countries, whose fathers were, at the times of their births, citizens of the United States. When a question, therefore, arises now before an executive department touching the *status*, at a particular time, of a person of American paternity and foreign nativity, the legal presumption in the first instance is, that the party is a citizen of the United States, and it rests upon any such person making a claim of exemption from our jurisdiction to show that, anterior or subsequent to the statute, he duly acquired, and is at the time invested with, the full rights of citizenship in a foreign country. If that fact be established, the primitive or original nationality impressed by the statute of 1855 may be

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regarded as having determined. I do not here discuss the general question of the right of expatriation under our law. The practice of the Government has long since rendered that discussion a mere abstraction.

Has Madame Berthemy acquired the rights of a French subject or citizen? It is observable that the Code Civil does not adopt the principle of English and American law, and constitute citizens absolutely of all persons born within the limits and jurisdiction of France of parents domiciled in that country. It provides that the quality of a citizen may be acquired by a person born in France of foreign parents on complying with certain conditions during the year following his majority. If he omit to comply with the formalities required during the time limited, he continues thereafter, and until otherwise naturalized, to be as much an alien in France as if his birth had occurred in a foreign country.

"Tout individu né en France d'un étranger, pourra dans l'année qui suivra l'epoque de sa majorité, reclamer la qualité de *Français*, pourvu que, dans le cás on il residerait en pays étranger, il fasse sa soumission de fixer en France sou domicile, et qu'il l'y établisse dans l'année, a compter de l'acte de soumission." (Liv. 1, chap. 1, art. 9.) The case, as submitted, does not state whether Madame Berthemy acquired French citizenship, under this provision of the Code Civil, during the year which followed the period of her majority. The question of her national character depends, therefore, upon the effect of her French marriage. That question is distinctly answered by this provision of the Code Civil, "Létrangère qui aura epousé un Français, suivra la condition de sou mari." (Liv. 1, chap. 1, art. 12.) She has, therefore, a good title by her marriage to the citizenship of France. A similar provision, respecting the marriage of foreign-born women with native-born or naturalized citizens of the United States, is contained in our statute of 1855, which again is substantially like the English statute of 7 and 8 Victoria, sec. 16. It is unnecessary to advert to the question whether a person formerly a

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citizen of the United States by birth or naturalization, who may have acquired, under the law of a foreign country, a new nationality, may by domiciliary residence in the United States become reinvested with the quality of a citizen of this country; because, in the case of this lady, there appears to have occurred, according to the statement submitted, no such domiciliary residence here as could constitute evidence of a desire and intention on her part to assume the duties and obligations of an American citizen.

I am therefore of opinion, on the facts stated, that Mrs. Berthemy is a citizen of France.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

PARIS EXPOSITION.

The Secretary of State has authority, under the joint resolution of July 5, 1866, to pay the moneys appropriated for the Paris Exposition to be expended in Europe, in coin.

ATTORNEY GENERAL'S OFFICE,
August 14, 1866.

SIR: I have considered the question submitted in yours of the 14th instant, in relation to the Paris Exposition. It appears that, by joint resolution of July 5, 1866, certain moneys were appropriated to cover expenses to be incurred by the United States "in order to enable the people of the United States to participate in the advantages of the exhibition," &c. The appropriations, six in number, are for specific purposes, some of which involve the payment of expenses, salaries, &c., to be made at Paris, such as the construction of fixtures at Paris necessary for the exhibition of our productions, and the compensation of commis-

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sioners and employees at the exhibition. You ask whether you can properly construe this resolution in such a way as to authorize the allowance of any part of the amount provided in coin, referring to the part which must be expended in Europe. In seems from the letter of Mr. Beckwith, the commissioner general of the United States at Paris, that the sums appropriated for these expenditures were fixed upon careful estimates made in Paris, and according to the money standard of value there, and that if these sums are reduced by the amount necessary to convert Treasury notes into the currency in which payment must be made, the American department of the Exposition will be a failure, and end in bankruptcy.

As a mere question of law, upon the construction to be placed on those clauses of this resolution which appropriate sums to be paid abroad, for expenditures incurred and to be incurred there, there might be some doubt as to whether Treasury notes should be the medium of payment.

The language of the act of February 25, 1862, commonly called the legal-tender act, is, that the Treasury notes "shall be receivable in payment of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin, and shall also be lawful money and a legal-tender in payment of all debts, public and private, within the United States, except duties on imports and interest, as aforesaid."

Undoubtedly, all claims against the United States, not specially excepted, which are payable at the Treasury, are payable in these notes. It is not so clear that debts of the United States, incurred and to be paid abroad, where our Treasury notes have no currency, come within the purview of this act. On the contrary, a reasonable construction leads to the conclusion, that in this class of debts and expenditures the rate of exchange must be taken into the account, so as to provide the full amount necessary to pay the debt or expenditure at the place of payment.

This conclusion is fortified by the uniform practice of

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the Government in relation not only to the payment of debts incurred abroad, but in the payment of our foreign ministers and other diplomatic and consular officers.

I understand this practice to be a payment abroad of the exact salary, without diminution for exchange or difference in currency value between our Treasury notes and the customary medium of payment at the foreign place. If such a construction—which seems not to have been questioned—is allowable in favor of the officers of the Government, it certainly is in favor of its creditors.

I am, therefore of opinion that you can properly authorize the payment of this class of the appropriations in such medium as will realize the full sum abroad.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

INSURRECTIONARY STATUS OF ARKANSAS.

The State of Arkansas, on the 11th of May, 1864, was in a condition of insurrection against the United States; and an act of Assembly of the State, passed on that day, was not a valid acceptance by the Legislature of the State of the act of Congress of July 2, 1862, known as the agricultural college grant.

ATTORNEY GENERAL'S OFFICE,
August 16, 1866.

SIR: The question submitted in your letter of the 3d instant is, whether the act purporting to be an act of Assembly of the State of Arkansas, dated May 11, 1864, was a valid acceptance by the Legislature of that State of the act of Congress, approved July 2, 1862, known as the agricultural college grant.

The answer to be given to this question depends upon the solution of two other questions: first, whether, on the 11th of May, 1864, the State of Arkansas was in a con-

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dition of rebellion or insurrection against the Government of the United States; and, second, whether, if such was the condition of the State at that date, she was competent to express, by a legislative act, her acceptance of the statute of 1862?

The condition of Arkansas at the time mentioned must be determined, for the purposes of the execution of the present statute, by the public declaration of the political department of the Government made in pursuance of the authority of Congress.

Congress, in the 5th section of the act of July 13, 1861, authorized the President to ascertain and declare by proclamation the existence of insurrection in the insurgent States, (12 Stats., 257.) Accordingly, on the 16th of August, 1861, President Lincoln issued his proclamation, declaring that the inhabitants of certain States, including Arkansas, were "in a state of insurrection against the United States." (12 Stats., 1262.) This proclamation having excepted from its operation the inhabitants of such parts of the States enumerated as might be, from time to time, occupied by the forces of the United States engaged in the dispersion of the insurgents, the President, in his subsequent proclamation of April 2, 1863, revoked that exception, and declared that Arkansas and other States were then "in a state of insurrection against the United States," and that the legal consequences of such insurrectionary condition would continue "until such insurrection shall cease, or has been suppressed, and notice thereof has been given by proclamation." (App., 13 Stats., 1.)

Again, on July 1, 1862, the President, in pursuance of the act of June 7, 1862, "for the collection of duties in insurrectionary districts," declared that Arkansas and other States were at that date "in insurrection and rebellion." (12 Stats., 1266.) Still further, in his proclamation of emancipation of January 1, 1863, President Lincoln declared Arkansas to be among the States "wherein the people thereof respectively are this day in rebellion against the United States." (12 Stats., 1269.)

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Insurrectionary Status of Arkansas.

The amnesty proclamation of President Lincoln, dated December 8, 1863, further embraced Arkansas as an insurrectionary State, invited the people to establish a loyal government on the plan therein proposed, and promised that such government, when organized, should be recognized by the President as the true government of the State. (13 Stats., 8.) There is an allusion in the subsequent proclamation of July 8, 1864, "to the free State constitutions and governments adopted and installed in Arkansas and Louisiana." The President announced that he was then unprepared to declare "that those governments should be set aside and held for naught." (*Ib.*, 14.) But there is no official evidence whatever that the President, before or at the date of his proclamation of July 8, 1864, either recognized the government established in Arkansas in 1863 as the legitimate government of the State, or regarded the establishment of such government as removing the insurrectionary condition authoritatively declared in the previous proclamation. The subsequent acts and declarations of the political department of our Government, on the contrary, show, that in the judgment of that department the insurrectionary condition of Arkansas subsisted independently of, and notwithstanding the erection therein of a loyal State government.

Without special reference to the series of proclamations issued by President Johnson after the surrender of the rebel armies in April, May, and June, 1865, relaxing the previous restrictions upon commercial intercourse, all of which imply the subsistence of a condition of hostility, there are two proclamations which conclusively establish the continuing insurrectionary condition of Arkansas beyond the date of the act of Assembly in question.

The first is that issued by President Johnson on December 1, 1865, revoking the suspension in the northern States of the privilege of the writ of *habeas corpus*, and expressly excepting from that revocation the southern States; thus impliedly affirming the continuance of insurrection in the States wherein the privilege of the writ remained sus-

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pended. The second, and more important, is the so-called "peace proclamation," dated April 2, 1866, wherein the President declared, "that the insurrection which *heretofore* existed in the States of Georgia, South Carolina, Virginia, North Carolina, *Arkansas*, (and other States,) *is at an end*, and HENCEFORTH to be so regarded." Thus it is announced that, on the 2d of April, 1866, the insurrection in Arkansas *terminated*. Its existence was first announced on the 16th of August, 1861; its termination was declared on the 2d of April, 1866. It continued of course during the whole period comprehended by those dates. We must, therefore, regard it duly established, as a fact in law, that, on the 11th of May, 1864, Arkansas was, within the meaning of the statute of 1862, in a condition of insurrection against the United States.

The question next for consideration is, whether the State was competent, by a legislative act, to accept the benefits of the statute of 1862, during the continuance of this insurrectionary condition? The statute expressly provides, that "no State, while in a condition of rebellion or insurrection against the Government of the United States, shall be entitled to the benefits of this act;" and further, that "no State shall be entitled to the benefits of this act unless it shall express its acceptance thereof by its legislature within two years from the date of its approval by the President."

It is clear to my mind, that, during the period of her disability to take the grant, her disqualification to express her acceptance of it, in the manner provided by Congress, continued.

The privilege or right of accepting the grant, with the conditions annexed, was intended manifestly to be conferred only upon such States as were capable of taking the benefits of it according to the terms of the statute; and we have seen that no State, while in a condition of rebellion, could take the benefits of the grant. The grant, in contemplation of the law, was not offered to any State in such condition, or while such condition lasted. How,

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then, it may be asked, could a State, to which the grant was not offered, do any act which can be regarded as a valid acceptance of the grant? The invalidity of the alleged acceptance by Arkansas of this alleged grant may thus be affirmed independently of the argument drawn from the inherent inability of a State in rebellion to act, in her political capacity, upon the proposal made by the United States in the present statute.

I am clearly of opinion, therefore, that the act purporting to have been passed by the General Assembly of Arkansas, on May 11, 1864, cannot be regarded as a valid acceptance of the statute of 1862, by the Legislature of that State.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. JAMES HARLAN,
Secretary of the Interior.

POWERS OF MISSOURI BOARD OF COMMISSIONERS.

The board of commissioners constituted by the act of April 17, 1866, to ascertain the amount of money expended by Missouri in equipping troops, have no power to issue compulsory process for the attendance of witnesses.

ATTORNEY GENERAL'S OFFICE,
August 16, 1866.

SIR: I have considered the question submitted for my opinion by your letter of the 11th instant, that is to say, Whether there is any, and what, legal process by which witnesses can be compelled to appear before the board of commissioners constituted by the act of Congress of April 17, 1866, entitled "An act to reimburse the State of Missouri for moneys expended for the United States in enrolling, equipping, and provisioning militia forces to aid in suppressing the rebellion." The 1st section of this act provides for the appointment by the President, with

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the consent of the Senate, of three commissioners, who are to ascertain the amount of moneys expended by Missouri.

Then follows this clause, "And the said commissioners shall be authorized and required to sit as a board at some place in the State of Missouri, and shall be authorized to call witnesses before them and examine them under oath." The act further provides for a clerk of the board, but for no other officer. It requires the board to proceed, subject to regulations to be prescribed by the Secretary of War, to examine the items of expenditure claimed by Missouri, and make up an account and a report to the Secretary of the Treasury, transmitting therewith "all the testimony taken by said commissioners," which account, if found to be correct, shall be paid. It further provides, that the commissioners shall be sworn to perform their duties.

The question arises upon the clause which provides that the board of commissioners "shall be authorized to call witnesses before them and examine them under oath." I was at first inclined to think that this authority to call witnesses before the board for the purpose of examination carried an implied authority to compel the attendance of the witnesses. It seemed to me something more than an authority to take the testimony of witnesses, or merely to request their attendance, and that if the call was disobeyed it might be enforced.

Further consideration has changed my first impression. This board is in no sense a court, nor is it vested with judicial power in that sense which would invest it with the ordinary attributes which belong to a court. These commissioners exercise a mere statutory authority. They derive all their powers from the statute, and these powers cannot be enlarged by implication.

In the case of courts-martial, although competent to examine witnesses, yet, there being no express authority to issue compulsory process against witnesses, it is held, that as to witnesses not belonging to the service no compulsory process can be used to compel their attendance.

So too, as far as my observation extends, in respect to

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boards of commissioners analogous to the one in question, when a compulsory process against witnesses is given, the grant is very explicit.

For instance, in constituting a board of three commissioners to settle private land claims in California, although express authority was given to administer oaths and examine witnesses, and although the board was to be attended by the marshal of the district, and had much more the character of a court than this board, yet as no express authority was given to compel the attendance of witnesses, it was found necessary to supply this omission by an amendatory act containing the following provision:

"That the said commissioners, or either of them, may issue the writ of subpœna, requiring the attendance of witnesses before the said board, and for any contempt in refusing obedience to such writ, the said board shall have the same power to inflict punishment now possessed by the district court of the United States."

It may be necessary, in order to protect the interests of the United States, that unwilling witnesses should be compelled to answer the call of this board, and I would suggest that application be made to Congress for authority like that given to the California commissioners.

Upon the law as it stands, I am of opinion that such compulsory process should not be attempted.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. EDWIN M. STANTON,

Secretary of War.

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CONSIDERATION IN DEEDS TO THE UNITED STATES.

In a deed to the United States the true consideration should be stated.

ATTORNEY GENERAL'S OFFICE,
August 28, 1866.

SIR: I have the honor to acknowledge the receipt of yours of the 25th instant, requesting my opinion, "Whether the sum of three thousand dollars can lawfully and properly be paid for a deed in which the consideration expressed is two thousand dollars, or whether a new conveyance for three thousand dollars should be required." There is no question but that the title to the land conveyed by the deed would be equally good, whether the consideration stated be two thousand dollars or three thousand dollars, but in reference to contingent liabilities under the covenants of seizure and warranty, the actual consideration given for the land may become important. It is, therefore, desirable that the actual consideration paid should be truly set forth in the deed. .

This would be, at least, *prima facie* evidence of the true amount; but, being in the nature of a receipt, the consideration stated in the deed may be explained by testimony. If a new deed can be readily executed, expressing the true consideration, which I understand to be three thousand dollars, I would advise that it be done. Otherwise, a receipt, to be signed by the grantor or grantors, and endorsed on the deed, stating the true consideration, should be required.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

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TAZEWELL'S CASE.

Bonds of the United States issued in 1842, and held at and before the commencement of the rebellion by a citizen of Virginia, who never took any active part in the rebellion, and whose property is not liable to seizure under the confiscation acts, are, in the year 1866, valid obligations of the United States in the hands of the holder, and may be lawfully paid to him.

ATTORNEY GENERAL'S OFFICE,
August 28, 1866.

SIR: I have the honor to give my opinion in the matter of John N. Tazewell on the following statement of facts:

Mr. Tazewell is now, and was during the rebellion, and for a long time before, a citizen of Norfolk, Virginia. At the commencement of the rebellion he held, and yet holds, as owner, several bonds issued by the United States under the loan of 1842. Part of these bonds belonged to his father, Littleton W. Tazewell, and were payable to his order. He died in 1860, and, in the distribution of his estate, the bonds were transferred by the executors to the present holder. The other bonds are registered bonds, all payable to the order of John N. Tazewell.

Mr. Tazewell has never taken any active part in the rebellion. No proceedings for confiscation have at any time been taken against the property of Mr. Tazewell or against these bonds. The question arises, upon this state of facts, whether these bonds are now valid obligations against the United States in the hands of Mr. Tazewell, and as such may be lawfully paid to him.

The rule is well established by public law, that private debts are not annulled by war.

The relation of creditor and debtor existing between the subjects of one belligerent and those of another is not abrogated by war. The remedy only is suspended, and upon the return of peace the debt and the remedies for its enforcement come again into full force.

The same rule is equally well established, and with even stronger sanction as to public debts, that is to say,

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debts due by one of the States at war to the subjects or citizens of the other State.

Debts of this nature are regarded as of the highest obligation, and esteemed more sacred in time of war than private debts. Vattel says of them, "The State does not so much as touch the sums which it owes the enemy; money lent to the public is everywhere exempt from confiscation and seizure in case of war."

Whether these liberal rules which prevail in lawful war between independent States extend in full force to a civil war, or a rebellion, need not now be considered, as the rule or policy to be applied in this case is quite clear upon the legislation of Congress.

By the confiscation acts of 1861, only property used in aid of the rebellion is made liable to seizure and confiscation. By the confiscation act of 1862, it is made the duty of the President to cause the seizure of all the property, real and personal, of certain classes of persons acting in an official capacity under the rebel authority, and of property situate in a loyal State belonging to a person who thereafter should give aid to the rebellion.

According to the statement of facts, Mr. Tazewell did not fall within any of these designated classes.

It will be observed that these classes do not embrace persons (other than those holding an official character) who have been engaged in armed rebellion or who have given aid to the rebellion, but as to such persons their property is only made liable to seizure in the event that, after sixty days' notice by proclamation of the President that they shall cease to aid and abet the rebellion, they fail to comply. The statement of facts does not bring Mr. Tazewell within the operation of this provision.

I have, therefore, to advise that the bonds held by Mr. Tazewell are valid obligations in his hands, and lawfully payable.

I am, sir, very respectfully,

Your obedient servant,

The PRESIDENT. HENRY STANBERY.

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BOMBARDMENT OF VALPARAISO.

1. The rule of international law is well established, that a foreigner who resides in the country of a belligerent can claim no indemnity for losses of property occasioned by acts of war of the other belligerent.
2. American merchants domiciled for commercial purposes at Valparaiso cannot sustain a claim for indemnity against Spain or Chilé for losses of merchandize in the conflagration caused by the bombardment of Valparaiso by the Spanish fleet in March 1866.

ATTORNEY GENERAL'S OFFICE,
August 31, 1866.

SIR: It appears from your letter of the 27th instant that the American commercial houses of Wheelwright & Co. and Loring & Co., domiciled for commercial purposes at Valparaiso, sustained losses of their merchandize in the conflagration caused by the bombardment of that city by the Spanish fleet on the 31st of March last.

The question presented for my opinion is, Whether a case is made for the intervention of the United States on behalf of these citizens for indemnity against Spain or Chilé?

I do not see any ground upon which such intervention is allowable in respect to either of those Governments.

The bombardment was in the prosecution of an existing war between Spain and Chilé.

Although, under the circumstances, it was a measure of extreme severity, yet it cannot be said to have been contrary to the laws of war, nor was it unattended with the preliminary warning to non-combatants usual in such cases.

It does not appear that in carrying on the bombardment any discrimination was made against resident foreigners or their property. On the contrary, there was at least an attempt to confine the damage to public property.

Then, as to the Chiléan authorities, it does not appear that they did or omitted any act for which our citizens there domiciled have a right to complain, or that the measure of protection they were bound by public law to extend to those citizens and their property was withheld.

No defence was made against the bombardment, for that

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would have been fruitless, and would have aggravated the damage, as Valparaiso was not then fortified, and no discrimination was made by those authorities between their own citizens and foreigners there domiciled. All shared alike in the common disaster.

The rule of international law is well established, that a foreigner who resides in the country of a belligerent can claim no indemnity for losses of property occasioned by acts of war like the one in question.

The bombardment of Copenhagen by the British in 1807 is a notable illustration of this rule. Immense losses were sustained by foreigners domiciled in that city. There was no previous declaration of war against Denmark, and no reasonable ground upon which the bombardment could be justified, and yet no reclamation upon the footing of these losses was ever admitted by Great Britain. The bombardment of Greytown, in May, 1854, by the United States sloop-of-war Cyane, is another instance of this rule. Losses were sustained by French citizens there domiciled from the fire of the Cyane. A petition to the United States from those parties for indemnity was presented through the French minister, then resident at Washington, but without the express sanction of his Government. Upon full consideration this petition was refused. Mr. Marcy, then Secretary of State, in answer to the claim, holds the following language: "The undersigned is not aware that the principle that foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of war has ever been seriously controverted or departed from in practice."

I have, therefore, to repeat, that I am of opinion no ground is laid for the intervention of the United States in favor of these parties.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. WM. H. SEWARD,

Secretary of State.

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STAMP TAX ON WRITS.

Notwithstanding the decision of the State courts of Tennessee that the act of Congress imposing stamp duty on writs and other legal instruments is unconstitutional, the officers of the United States should be instructed to institute proper proceedings against all persons in that State guilty of a violation of the act of Congress.

ATTORNEY GENERAL'S OFFICE,
September 1, 1866.

SIR: It appears by your letter of the 18th ultimo and the accompanying papers, that one of the judges of the supreme court of Tennessee has decided that the stamp duty on writs and other legal papers, imposed by the 170th section of the internal revenue act of June 30, 1864, is unconstitutional, and that a judge of one of the circuit courts of the same State has made a similar decision. You ask my opinion as the constitutionality of this duty, and if I should be of opinion that it is constitutional, then to advise what steps should be taken in the premises.

The grounds upon which the unconstitutionality of these stamp duties is placed by the decisions referred to are not stated.

I have no doubt of the power of Congress to impose these stamp duties, and am left to conjecture upon what grounds the contrary is maintained. It is probable that the validity of these duties is questioned on the ground that they are in the nature of a direct tax, and therefore could only be laid by the rule of apportionment provided for in the Constitution.

The Supreme Court of the United States has long ago given such a construction to the term "direct tax" as would exclude these stamp duties from being put in that category.

It is made the duty of the district attorney to prosecute for infractions of the internal revenue law that may happen within his district. I would therefore suggest, that you instruct the collector of the proper district to call upon the

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district attorney, and request the institution of proceedings against any person or persons who are required, but fail, to affix stamps to legal instruments

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

EQUALIZATION OF BOUNTIES.

1. Drafted men and substitutes are entitled to the bounty provided by the act of July 28, 1866.
2. Soldiers enlisted in the regular army between the 19th of April and the 1st of July, 1861, are entitled to the bounty provided by that act.
3. Non-resident parents of deceased soldiers are entitled to the bounty.
4. The 14th section of the act of 1866 does not cover the case of a sale by the heir of a soldier.
5. If a soldier brings himself within all the qualifications specified in the act, of enlistment, service, and honorable discharge, he is entitled to the bounty; and he cannot be required to make an affidavit, that he was not a deserter from the service during the term of his enlistment.

ATTORNEY GENERAL'S OFFICE,

September 7, 1866.

SIR: I have examined the report of the board of officers organized under an order of your Department to prepare rules and regulations in conformity with the provisions of the act to equalize bounties, approved July 28, 1866, touching which you request my opinion, whether those rules and regulations are in accordance with the provisions of that act and other existing laws on the same subject.

Except in the particulars which I shall now proceed to mention, I can see nothing in any of these rules and regutions at all objectionable. These particulars are:

1. By the seventh regulation, it is provided that drafted men and substitutes are not entitled to the bounty provided in this act; and the reason given for their exclusion is, that they have not been "enlisted" within the meaning of the act.

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The act of March 3, 1863, section 11, provides that drafted men, "when called into service, shall be placed on the same footing in all respects as volunteers for three years or during the war, including advance pay and bounty, as now provided by law." Section 17 of the same act places substitutes on the same footing with drafted men.

These sections show very clearly that drafted men and their substitutes come within the policy of Congress as to bounties. In point of fact, after such soldiers are mustered into the service, they stand in all particulars upon the same footing with the volunteers as to pay, duties, rights, and liabilities.

The section of the law of 1866 which is construed by the board to exclude them is as follows: "That each and every soldier who enlisted into the army of the United States after the 19th day of April, 1861, for a period of not less than three years, and, having served the time of his enlistment, has been honorably discharged," &c. It is upon the word "enlisted," that the exclusion is placed by the board. In a very strict sense, it may be said that a *drafted* man is not an *enlisted* man, but, in a more general and comprehensive sense, the term "enlisted men," is understood to comprehend drafted soldiers or substitutes. The term is frequently used by Congress in this comprehensive sense.

It seems to me, from the nature of this section, that it should receive a liberal construction in favor of the bounty intended to be given. Inasmuch as drafted men and substitutes have been declared, as we have seen, to be within the liberal policy of the Government as to bounties, and as their services are quite as useful as those of volunteers, and considering further the comprehensive words of this section, reaching "each and every soldier," I am of opinion that they come within the meaning and purview of the section, and are entitled to the bounty.

2. The board have also excluded from the bounty soldiers enlisted in the regular army between the 14th of April, 1861, and the 1st of July, 1861. As to such soldiers, the board says:

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"Regulars enlisted between the 14th of April, 1861, and the 1st of July, 1861, although enlisted within the meaning of this act, are excluded by the qualifying provision, that they shall receive, or are entitled to receive, a bounty of one hundred dollars and no more."

It is true that no previous law gives a bounty to regular soldiers enlisted between the 14th of April, 1861, and the 1st of July, 1861. The act of July 22, 1861, which provided for the first bounty to volunteers, did not include regulars. It was, however, provided by the act of July 29, 1861, that the men enlisted in the regular forces, after the first day of July, 1861, shall be entitled to the same bounties, in every respect, as those allowed or to be allowed to the men of the volunteer forces.

Now, the question is, whether those soldiers who enlisted in the regular army between the commencement of the war and the 1st day of July, 1861, are intended to be excluded by the provisions of the act now under consideration. The board so construe the law as to make it an indispensable qualification for the bounty, that the soldier has already received at least one hundred dollars of bounty, and to declare that the receipt of bounty in excess of one hundred dollars works a disqualification. No doubt, as to the disqualification, the board is perfectly correct. If the soldier has received more than one hundred dollars bounty, he does not come within the purview of this section. Such excess over one hundred dollars is taken to have sufficiently compensated him for his services.

But we must reverse this policy if we hold that the purpose was also to exclude the soldier who has not received quite one hundred dollars, or who has received nothing at all.

Certainly it would require very stringent language to work such a result as that. I agree that if we read the words used in a strictly literal sense we would reach the result: 1st, exclusion of the soldier who had received more than a hundred dollars, because it was too much; and, 2dly, who had received less than one hundred dollars,

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because it was too little. It is just because such a result would follow from a literal construction that we are to avoid a literal construction.

Looking, then, to the spirit and meaning of this law, the only exclusion that seems to me to have been intended is of those soldiers who have already received a greater bounty than one hundred dollars.

I am therefore of opinion, that soldiers enlisted in the regular army, between the 14th (or rather the 19th) of April and the 1st of July, 1861, are entitled to the bounty provided by this act.

I may add, in support of this construction, that the regular soldier so enlisted prior to the 1st of July, 1861, comes within every other term of description used in the section, for he is a soldier enlisted into the army of the United States after the 19th of April, 1861, for a period of not less than three years, and has served out his enlistments and been honorably discharged. It would seem as if it was the clear purpose to include every soldier so enlisted after that date.

3. The 9th section of the regulations excludes from the right of inheritance from the deceased soldier the parents of such soldier, if thy happen to be non-residents. The regulation is in these words:

"Non-residence in the United States shall not be a bar to the claims of widows or children under the provisions of the act, but no other non-residents shall inherit under it."

Upon looking into this act, I find no such qualification. The bounty of the deceased soldier is to be paid to "the widow, minor children, or parents, in the order named." Nothing is said as to residence or non-residence.

I suppose the board, in framing this regulation, were guided by the provisions of the act of July 11, 1862, which, under certain circumstances, gave the bounty to the father or the mother of the deceased soldier, if they were residents of the United States. But that act only applied to the bounty then provided for, and the order of

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inheritance was in some respects different from that provided in this law.

I am therefore of opinion, that non-residence does not bar the right to the bounty.

4. The board also excluded from the bounty the *heirs* of deceased soldiers who have bartered, sold, assigned, loaned, transferred, exchanged, or given away their final discharge papers. The 14th section of the act provides that any *soldier* who shall have bartered, sold, assigned, transferred, loaned, exchanged, or given away his final discharge papers, for any interest in the bounty provided by this or any other act of Congress, shall not be entitled to receive any additional bounty whatever, and he is required to make oath that he has not so disposed of his discharge papers.

This is a severe enactment; and inasmuch as it is confined to a sale by the *soldier*, I do not think it can be construed to cover the case of a sale by the *heir* of a soldier.

I am not quite sure that I have understood the board correctly in this particular. The language used by the board in declaring this ground of exclusion from the bounty is as follows:

"The surviving soldiers and heirs of deceased soldiers who have bartered, sold, assigned, loaned, transferred, exchanged, or given away their final discharge papers, or any interest in the bounty provided by this act, or any other act of Congress."

If the board intended this to apply to a sale by an heir or one of the heirs, I am of opinion that such construction is admissible. If, however, the intention is only to reach a sale by the soldier himself, then the rule should be made more definite.

5. It is also provided by the second regulation, that no application shall be entertained unless accompanied by the original discharge of the soldier. This is undoubtedly in conformity with the latter clause of section fourteen of the act, which is in these words:

"And no claim for such bounty shall be entertained by

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the Paymaster General, or other accounting or disbursing officer, except upon the receipt of the claimant's discharge papers, accompanied by the statement under oath, as by this section provided."

The provision is so clear, that we are not allowed in any case to rely upon secondary evidence as to the soldier's discharge. He is required to produce that paper as a condition precedent to receiving the bounty of the Government. No secondary evidence can be heard, no matter how conclusive it may be, to show the existence and loss of the paper. I can, however, see no remedy except by the action of Congress.

6. In this same 2d section, the board requires a further affidavit, beyond that required by the 14th section, "that the applicant was not a deserter from the service of the United States, nor from the rebel service, nor a rebel prisoner of war, at the date of any of his enlistments into the service of the United States, and that he was not a deserter from the said service during the term of his enlistment."

There is certainly no provision in the law requiring such an affidavit, and if the soldier brings himself within all the qualifications specified in the act, that is to say, of enlistment, service, and honorable discharge, I cannot see upon what ground these further tests are to be applied to him. I am aware that they are provided as exclusions from former bounties, but Congress has not seen proper to adopt them in this act. Nor can I see that it is against the policy of the Government to admit them to bounty, for no deserter from our army who has not returned and been again accepted as a soldier, and honorably discharged, can ask for bounty; and as to deserters from the rebel service who have served in our army and been honorably discharged, there is no reason why they should be excluded from the bounty of the Government.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

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THE ARLINGTON ESTATE.

1. A certificate of sale issued to the United States upon a purchase by them of property under the direct tax act of June 7, 1862, should be signed by the commissioners who constituted the board at the time of the issuing of the certificate.
2. Such certificate should bear date as of the day it is actually signed.

ATTORNEY GENERAL'S OFFICE,
September 3, 1866.

SIR: The estate known as "Arlington," in Virginia, by direction of the President, given under the authority of the act of June 7, 1862, "for the collection of direct taxes in insurrectionary districts," was bid in by the tax commissioners for that State, and struck off to the United States, for Government use.

This occurred at an advertised sale of the property on the 11th of January, 1864.

It appears that no certificate of sale has ever issued to the United States, and that since the property was stricken off, one of the commissioners then in office has resigned his position on the board, and another person has been appointed in his place.

The questions arising in your Department on this state of facts are,

1. Whether the certificates to be issued to the United States should be signed by the members of the present board of commissioners or by those who constituted the board at the time of the sale?

2. Whether the certificate should bear date as of the day of sale, or have the date of its actual issue?

3. What are the essential recitals to be made in the certificate?

1st. It is not very clear that the act requires a certificate to be issued for property bid in for, or stricken off to, the United States at a sale for direct tax. But it is not important to determine that question, since there is no prohibition contained in the statute against the issue of a

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certificate to the United States as in the case of sale to a private party, and it is, moreover, altogether expedient that the Government should possess written evidence of its title to property acquired under the act. Assuming, therefore, that the United States are entitled to a certificate of sale in the present case, I am of opinion that such certificate should be made by the members of the existing board of commissioners, and not by those who constituted the board at the time of the sale. All the acts authorized or required to be performed by the commissioners are done by them in the character of a board. The members of the board may die, resign, or be removed, and others may take their places; but the board, in contemplation of the law, never ceases to exist so long as it is constituted in conformity with the statute. The authority of the commissioners being exercisable by them in their joint character as a board of commissioners, it follows that when any act is to be performed by them in their official capacity, it must be done by those who are lawfully members of the board at the time the act is to be performed. Those who were members of the board when the sale was made are not members now. Those who are now members of it were not members then. The former cannot perform any official act. Their authority, under the law, terminated when their membership of the board ceased. The only persons, therefore, who can lawfully perform the duties and exercise the authority of the board are those who at this time constitute it.

2d. I think that the certificate should be dated as of the day on which it is actually executed by the commissioners. It is merely the evidence of the title of the purchaser, and does not of itself transfer or convey the title. That passed when the sale was made.

3d. Such facts should be recited in the certificate as show the jurisdiction of the board to make the sale, and the regularity of the proceeding under which the title was acquired by the United States.

The certificate accompanying your letter contains all the

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recitals that are necessary, but it should be modified in the particulars in which it purports to be made by the members of the board existing at the date of the sale, so as to purport to be given by the present board.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

PRESIDENT'S POWER TO FILL VACANCIES IN RECESS OF THE SENATE.

The President has full and independent power to fill vacancies in the recess of the Senate without any limitation as to the time when they first occurred.

ATTORNEY GENERAL'S OFFICE,
August 30, 1866.

SIR: I have considered the question which you have submitted for my opinion, that is to say, Whether, in cases where appointments have been made of postmasters in the recess prior to the last session of the Senate, and there was a failure during the session to make a permanent appointment, either by the refusal of the Senate to confirm the nominee, a failure to act on the nomination, or other cause, the President can make another temporary appointment in the present recess.

The clause of the Constitution under which this question arises is as follows:

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session."

Upon the facts stated, it does not appear that there was a vacancy until after the session was over. In the sequel, I shall again refer to this position; but as some claim that the vacancy does happen, within the meaning of the

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Constitution, before the recess, I propose to consider the general question, whether the President can fill up a vacancy in the recess which existed in the prior session. I am not aware of any decision of the Supreme Court that has any direct bearing upon this question. It has, however, frequently been passed upon by my predecessors. Mr. Wirt in 1823, Mr. Taney in 1833, and Mr. Legaré in 1841, concur in opinion, that vacancies first occurring during the session of the Senate may be filled by the President in the recess. Mr. Mason, in a short opinion given in 1845, held that vacancies known to exist during the session could not be filled in the recess; but in a more elaborate opinion written in 1846 he expresses general concurrence with his three predecessors.

All these concurring opinions give a construction to the meaning of the words, "vacancies that may happen during the recess of the Senate;" and, as I understand them, they agree that these words are not to be confined to vacancies which first occur during the recess, but may apply to vacancies which first occur during the session and continue in the recess.

It may be well at this point to bring in review some of the contingencies which may attend a vacancy in the recess which first occurred during the session.

1. It may not become known until the recess; a contingency which often occurs by the death of incumbents at distant points.

2. It may have occurred by the failure of the Senate to act upon a nomination.

3. Or upon a nomination and confirmation, where the party so nominated and confirmed refuses, in the recess, to accept the office.

4. Or by the rejection of the nominee of the President in the last hour of the session.

5. Or by the failure of the President to make a nomination during the session, or after a rejection of his nominee.

You will observe that I have not put in this category

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the case stated in your letter, that is to say, where, after an appointment by the President in the recess, and a nomination at the next session, there is a failure of the Senate to confirm the nomination for want of time or any other cause.

It is not clear that the vacancy which exists after the adjournment of the Senate can be said to have occurred during the session. The appointment fills the office, and the language of the Constitution is, that "it shall expire at the end of their next session." It was upon this state of facts that Mr. Taney gave his opinion in 1832, and held on this point, that "the vacancy did take place in the recess," and that "the former appointment continued during the session, and there was no vacancy until after they adjourned."

As this construction has been much questioned, I do not propose to stop upon it, but prefer to place my opinion on other grounds, independent of the question whether the vacancy first occurred during the session or during the recess.

Those who argue for the construction that the vacancy to be filled by the President must first occur in the recess, claim that such a construction arises inevitably by force of the words "all vacancies that may happen during the recess of the Senate." They claim that a vacancy which does not first occur in the recess cannot be said to happen in the recess. It is the point of time when the vacancy begins that they say is to be considered. This is one reading of this section, and so far as the mere letter is concerned, it is perhaps the most obvious. But even if we confine ourselves to this section alone, and to its literal interpretation, there is room for grave doubt. The subject-matter is a *vacancy*. It implies duration, a condition or state of things which may exist for a period of time. Can it be said that the word *happen*, when applied to such a subject, is only properly applicable to its beginning?

If this word is used in reference to an action or event that takes place at a punctual point of time, it must neces-

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sarily be confined to that special hour; but a vacancy is not such an event. It has a beginning, it is true, but it necessarily implies continuance. It is precisely the same thing from the beginning to the end during the period of its duration. If we mark the time of a single action, we say it happened at that time, for it could not be said to happen at any other. But when we speak of such a subject as a vacancy, we must use some other term to mark its beginning, for it may well be said to happen at every point of time that it exists. I incline to think, upon the mere words, that we might construe them precisely as if the phrase were, "If it happens that there is a vacancy in the recess," or "if a vacancy happens to exist in the recess." This, upon the words alone, was the construction put upon this section by Mr. Wirt, and since followed by all his successors in this office who have expressed an opinion on the question. But the rules of construction do not confine us to the words of the section, and do not compel us to adopt a construction according to the mere letter. When we look to other sections of this article, and to the reason and policy of the enactment, all nice criticism must give way to more enlightened construction.

It is in the arrangement of executive power that we encounter this question. First of all, it is the President who is made the recipient of this power. The grant is in these words: "The executive power shall be vested in a President of the United States." By another section, it is provided that "he shall take care that the laws be faithfully executed." Now, it is of the very essence of executive power that it should always be capable of exercise. The legislative power and the judicial power come into play at intervals. There are, or may be, periods when there is no legislature in session to pass laws, and no court in session to administer laws, and this without public detriment; but always and everywhere the power to execute the laws is, or ought to be, in full exercise. The President must take care at all times that the laws be faithfully executed. There is no point of time in which the power to

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enforce or execute the laws may not be required, and there should not be any point of time or interval in which that power is dormant or incapable of acting.

It is in view of this necessity that another clause of this article makes careful provision against a vacancy in the office of President, by providing that, upon the death, resignation, or removal of the President from office, the powers and duties shall at once devolve on the Vice President, and, by enjoining on Congress to make further provision in case of the death of the Vice President, as to what other officer shall then act as President until another President shall be elected.

If any one purpose is manifest in the Constitution, if any one policy is clearly apparent, it is, that in so far as the chief or fountain of executive power is concerned, there shall be no cessation, no interval of time when there may be an incapacity of action.

But the President, although the source of executive power, cannot exercise it all himself. It is comparatively but an infinitesimal part of all that is to be done or executed that he can perform. He must act by the agency of others. Accordingly, we find ample provision made for that purpose. The executive power vested in the President by the Constitution has, in many respects, an unlimited range, extending over a time of war as well as a time of peace.

He is made commander-in-chief of the army and navy, and of the State militia whilst in the actual service of the United States. All our foreign relations are conducted by officers of his nomination. So, too, all our military and naval officers, and, finally, our civil officers everywhere, whether judicial or strictly executive, are, with the exception of some inferior officers, to be nominated by him.

No other branch or department of the Government shares with the President this power to nominate. It is true that the President does not create the officers. *That*, in general, is part of the legislative power. But the mere legislative creation of an officer, and the provision by law for the duties to be performed by the officer, do not put

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the officer in place or the law in execution. No matter what may be the necessity, the power to fill the office is not vested in the legislative department. So, too, it is equally true that the President could not execute the duties of the officer himself. He cannot sit as a judge or perform the duties of a marshal. These, like most executive powers, can only be exercised by one agent; that is to say, by the designated officer, and this officer can only be put in place upon the nomination of the President.

When, then, we see that the Constitution vests the executive power in the President, and vests in him alone the power to appoint officers to exercise the power, and requires of him alone (not of Congress or the Senate) that he take care that the laws be faithfully executed, we could hardly expect to find his hands tied by a section which would frustrate all these provisions. And yet this is the necessary result of the verbal construction which I have mentioned; for that construction prevents the President from filling any vacancy in any office during the recess of the Senate, unless it be a vacancy which first occurs in the recess.

Now, when the Constitution guards with so much care against a vacancy in the office of President, how does it happen that, as to the only agency through which the President can act, there is found a provision exactly contrariwise, that a vacancy in such agency shall continue, and that for a time, longer or shorter, there is no power to fill it, no matter what may be the emergency or how much the public interests may suffer. In other words, to go according to this verbal reading, there may be times when the executive power is dormant, and must remain dormant—times when the President cannot act himself, and cannot appoint any officer to act, and during which the execution of the laws is so far suspended.

Take, as an example, the case of a foreign minister at a distant court, charged with the most important duties pressing for attention at a critical conjuncture, whose office becomes vacant by his death during the session of the

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Senate, but the vacancy is not known by the President until after the adjournment. Here is an instance of a vacancy which first occurs during the session, and which, upon this construction, cannot be filled in the recess.

Take another example: The death of a head of department just on the eve of the adjournment of the Senate, without time for a new nomination, or the rejection of the nominee followed by an adjournment. Is the President to be left, during all the recess, to carry on the Government without the very aid contemplated by the Constitution? I might multiply cases to show the consequences to which the verbal construction leads, but I prefer to rest the question upon higher grounds.

The true theory of the Constitution in this particular seems to me to be this: that as to the executive power, it is always to be in action, or in capacity for action; and that, to meet this necessity, there is a provision against a vacancy in the chief executive office, and against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session, they must assent to his nomination. If the Senate is not in session, the President fills the vacancy alone. All that is to be looked to is, that there is a vacancy, no matter when it first occurred, and there must be a power to fill it. If it should have been filled whilst the Senate was in session, but was not then filled, that omission is no excuse for longer delay, for the public exigency which requires the officer may be as cogent, and more cogent, during the recess than during the session. I repeat it, wherever there is a vacancy there is a power to fill it. This power is in the President, with the assent of the Senate whilst that body is in session, and in the President alone when the Senate is not in session. There is no reason upon which the power to fill a vacancy can be limited by the state of things when it first occurred. On the contrary, the only inquiry is as to the state of things when it is filled.

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For instance, take the case of a vacancy which does first occur during a recess, but is not filled when the session begins. If the verbal construction is sound, such a vacancy may be filled by the President without the consent of the Senate whilst the Senate is in session; but no one maintains that position.

All admit that whenever there is a vacancy existing during the session, whether it first occurred in the recess or after the session began, the power to fill requires the concurrent action of the President and Senate. It seems a necessary corollary to this, that where the vacancy exists in the recess, whether it first occurred in the recess or in the preceding session, the power to fill is in the President alone. If during the recess the power is not in the President, it is nowhere, and there is a time when for a season the President is required to see that the laws are executed, and yet denied the very means provided for their execution.

It is argued by those who deny this power to the President, that to allow it would disappoint the clear intent to give the Senate a participation in appointments to office. It is said that, if the President can by his own act fill a vacancy which occurred during the session, he may, if so disposed, wholly omit to nominate an officer during the session, and leave all such vacancies open, and then fill them in the recess. Undoubtedly the President may do all that, and may intentionally abuse his power.

The answer to this objection is obvious: In the first place, it may be said that arguments against the existence of a power, founded on its possible abuse, are not satisfactory. If they were, then an objection against any control by the Senate over the President's appointments would be equally cogent, for we may imagine that the Senate might refuse to consent to every appointment made by the President, or to any appropriation to pay the salaries of officers, and thus leave the Executive without power to execute the laws.

In the second place, if this argument, founded on the

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possible abuse of power, is sound, then it may equally well be urged against the power of the President to make removals, for it may be imagined that, after the adjournment of the Senate, the President in the recess may remove every officer, civil and military, whose tenure of office is not during good behavior, and thus create vacancies in *the recess* all to be filled by his own appointments. As these appointments are to continue until the end of the next session of the Senate, the President might omit to make any nomination to the Senate, and then, in the ensuing recess, reappoint the same or other officers, and thus throughout his term of office defeat entirely any participation on the part of the Senate.

I take it for granted that this unlimited power for removal belongs to the President, though I am quite well aware that some are still found to deny it, and to reiterate arguments used without avail nearly eighty years ago, and to keep open a question settled by usage from the commencement of the Government.

This very power of removal comes with signal force in aid of the power of appointment. If the President can make a vacancy at all times, he must have the correlative power to fill the vacancy at all times. To avoid the mischief of a bad officer, he has at all times the power to create a vacancy; but it may be as great, perhaps a greater mischief to have a vacant office, or no officer at all, than to have a bad or inefficient officer. Why then allow him at all times the power to correct the mischief of a bad officer by a removal, and deny the power at all times to correct the mischief of a vacancy by an appointment?

The argument against the power of the President to fill a vacancy in the recess which began in the session, founded on a supposed intent to guard from usurpation by the President the proper authority of the Senate, amounts to nothing when we consider how thoroughly this may be done under the power of removal; for what is the difference between a vacancy which began in the session, or was caused in the recess by the act of the President? And if, by the power

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of removal, all the appointments may be usurped by the President, why look for guards in only one particular, and such a guard as creates, perhaps, a greater mischief than it prevents; for it seems a greater evil to be without officers altogether, than to have officers who hold only by the temporary appointment of the President? I say by the *temporary* appointment of the President; for, in strict language, the President cannot invest any officer with a full title to the office without the concurrence of the Senate. Whether the President appoints in the session or in the recess, he cannot and does not *fill the office* without the concurrence of the Senate. He may *fill the vacancy* in the recess, but only by an appointment which lasts until the end of the next session.

For instance, in filling a vacancy in the office of judge, whose tenure is in effect for life, his appointee can only hold for a fraction of time. So, too, of a marshal, whose regular term is four years; the officer appointed to fill the vacancy can scarcely hold for an entire year. Here, then, is the safe and only guard which protects the just rights of the Senate, the express provision that an appointment made in the recess shall only extend until the end of the next session of the Senate. This protection applies equally to all appointments in the recess, whether to fill vacancies then first occurring or that first occurred during the session. It is an ample provision to secure the Senate from everything except an abuse by the President of his own constitutional powers of removal and of filling vacancies by so exercising them as intentionally to frustrate the intervention of the Senate.

We must not forget that this power of appointment to office is essentially an executive function. It belongs essentially to the executive department rather than to the legislative or judicial. If no provision on the subject had been made by the Constitution, it would have been held appurtenant to the President as the head of the executive department, specially charged with the execution of the laws.

Hence his power at all times to vacate offices and to

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fill vacancies. He can by his own act do everything but give full title to his appointees, and invest them with the right to hold during the official term. *That* he cannot do without the consent of the Senate; but such is his power over officers, that, after the Senate has consented to his nomination, or, in common parlance, has confirmed it, the nominee is not yet fully appointed, or even entitled to the office, for it still remains with the President to give him a commission or to refuse it, as he may deem best, and without the commission there is no appointment. This was held by the Supreme Court in Marbury *vs.* Madison, and when to that decision we add the doctrine recognized by the same court in *ex parte* Hennen, we see how fully the appointment and removal of officers is held to be a necessary incident of executive power.

Finally, when I consider that the construction which denies the President the power to fill a vacancy in the recess which first occurs in the session extends to all such vacancies without exception, as well to those not known until the recess as to those known before; to those occasioned altogether by the neglect or failure of the Senate to assent to a nomination, or to act upon a nomination; to those where the fault is with the Senate as well as to those where the fault is with the President, I cannot escape the conviction that such a construction is unsound.

I am accordingly of opinion, that the President has full and independent power to fill vacancies in the recess of the Senate, without any limitation as to the time when they first occurred.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. A. W. RANDALL,
Postmaster General.

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JURISDICTION OF ACCOUNTING OFFICERS.

1. The Secretary of War has authority to withhold his signature from a requisition for an amount which he believes to be not properly due, though certified to by the accounting officers of the Treasury Department.
2. The opinion of Attorney General Bates, of April 25, 1862, upon this subject, approved.

ATTORNEY GENERAL'S OFFICE,
September 15, 1866.

SIR: I have considered the question submitted for my opinion in your letter of the 24th ultimo, "Whether the Secretary of War is authorized to withhold his signature from a requisition for an amount which he believes to be not properly due, though certified to by the accounting officers of the Treasury Department?"

My predecessors in this office have settled this question again and again in favor of the right of a head of department to refuse his assent to the action of the accounting officers of the Treasury upon claims arising in his department. It would be a weary task to recapitulate all these opinions, and I will therefore content myself with an extract from the opinion of Mr. Bates, the last opinion which I find on the question, delivered on the 25th of April, 1862:

"The important question of the authority of the heads of departments to interfere with the action of the accounting officers upon accounts arising within their respective departments has been so frequently and thoroughly considered by my predecessors, that, so far as this office is concerned, I may well regard it as settled. In an elaborate opinion furnished to the President, Attorney General Crittenden, (5 Opinions, 636,) announced his conclusion as follows: 'Upon the authority of the opinions of my predecessors in office, and upon principle and practice, the rightful authority of the head of the department to interfere, *a priori* or *a posteriori*, is well established as

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binding on the Auditor and Comptroller.' And he cites in support of that conclusion the opinion of Attorney General Wirt, (1 Opinions, 678,) Attorney General Berrien, (2 Opinions, 303,) Attorney General Taney, (2 Opinions, 463, 786,) Attorney General Butler, (2 Opinions, 625, 652,) and Attorney General Johnson, (5 Opinions, 89.) To these may be added the opinions of Attorney General Cushing, in Whitman's Case, (7 Opinions, 724,) and in Benham's Case, (8 Opinions, 299,) where he says: 'And although doubts were at one time raised upon the point, yet the law is now settled, according to the ruling of one of my predecessors, (Mr. Crittenden,) that in all such cases the auditing and controlling are subject to the superior supervision of some appropriate head of department and to the President.' And these authorities fully cover cases referred by special acts of Congress to one or more of the accounting officers, as well as cases arising in the ordinary routine of the accounting bureaus."

I have further to say, that my own consideration of this question has led me to the same conclusion.

I am accordingly of opinion that you are authorized to withhold your signature from a requisition for an amount which you believe to be not properly due, though certified to by the accounting officers of the Treasury Department.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. EDWIN M. STANTON,

Secretary of War.

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PATENTS FOR LANDS SOLD FOR DIRECT TAXES.

The patents authorized to be issued by the 2d section of the act of March 3, 1865, for lands sold for direct taxes, are to be issued by the General Land Office and not by the Treasury Department.

ATTORNEY GENERAL'S OFFICE,
September 13, 1866.

SIR: I have considered the questions submitted for my opinion in your letter of the 7th instant, arising upon the 2d section of the act of March 3, 1865, "to amend an act for the collection of direct taxes in the insurrectionary districts," &c. That section is in these words:

"That after the time allowed for the redemption of any lands or tenements which have been or shall be sold by a board of tax commissioners shall have passed, and after the purchase-money shall have been fully paid, the President is authorized and required to cause a patent or patents to be issued to any such person as may be the *bona fide* purchaser, owner, assignee, or transferee of such lands or tenements, under and by virtue of any certificate of sale, or under and by virtue of any assignment or transfer of such certificate: *Provided*, That in case of an assignment or transfer of a certificate of sale the person applying for such patent shall give satisfactory proof to the Commissioner of the General Land Office of the preceding transfers or assignments."

The questions you submit for my opinion are as follows:

1. Is the law to be understood as providing for the issue of these patents by the Treasury Department?

2. If not, does the law devolve upon the President the right of designating the department or bureau by which the issue is to made?

3. In case the President shall require the patents to be issued by some other department, may he also prescribe the character and extent of the evidence to be furnished by this department?

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Accompanying your letter is a communication from the Commissioner of the General Land Office to the Secretary of the Interior, bearing date July 5, 1866, in which the opinion is expressed that the patent is not to be issued by the General Land Office, but rather by the Treasury Department, or by such department as may be designated by the President. I have read this opinion with great attention, but I am not able to concur with the Commissioner. It is very true, that all the proceedings for the sale of lands for non-payment of these taxes are had under the supervision of the Treasury Department, and that all, or nearly all, of the records touching the proceedings belong to that department. It is upon these provisions that the Commissioner of the General Land Office argues, that as the evidence upon which the patent is to be issued is to be found in the Treasury Department, the duty of issuing the patent should properly appertain to that department. There is, undoubtedly, cogency in that view, but it certainly cannot prevail against what seems to me the clear intention, that the patent is not to be issued by the Treasury Department.

In the first place, the 2d section requires the President to cause a patent to be issued to the original purchaser, or to an assignee, without designating the department or bureau out of which the patent shall issue. Then follows the proviso, that in case of an assignment the person applying for such patent shall give satisfactory proof to the Commissioner of the General Land Office of the transfer or assignment.

I entertain no doubt that the patent referred to in this 2d section must be issued out of the General Land Office, and not out of the Treasury Department; and this would be the construction I should put on the section, even without the aid of the proviso. We find that the President is required to cause the patent to be issued to the purchaser or his assignee, but there is no direction as to who is to sign or seal the patent, or record the same.

Of course we must look for these directions in some

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other laws, and we find them in the laws which regulate the General Land Office. It is in those acts that we find that all patents for lands, to be granted or made by the United States, are to issue out of that office, and to be issued in the name of the United States, and under the seal of that office, and be signed by the President, and countersigned and recorded by the recorder of that office. But when, in addition to this, we look to the *proviso*, what was implied before becomes apparent. Why is the assignee of the original purchaser applying for a patent to make satisfactory proof of the assignment to the Commissioner of the General Land Office, if the business of issuing the patent does not appertain to that office? If it is the Treasury Department which is to issue the patent, why not provide that *in this respect*, as in all others, the business shall be settled in that department, and this proof be made to the Secretary or the head of a bureau of the Treasury? Again, where is any provision for the certifying of the Commissioner's opinion as to the sufficiency of the proof to the Secretary of the Treasury for his final action?

The objection made by the Commissioner of the General Land Office, that all the evidence upon which the right to the patent depends is in the Treasury, seems to me not well taken. Official copies may be had from the Treasury which will answer quite as well as the originals. Nor do I agree with the Commissioner that the office or department out of which these patents are to issue must examine all the proceedings, and be satisfied that they are conformable to law, and pass a good title, before a patent can be issued. I incline to think that the patent must issue as of course to the original purchaser on the production of the certificate of sale, or to his assignee upon proof of the assignment. This patent is designed to take the place of the certificate, as a more formal document, and to be placed on record. I do not think, looking to the nature of the title, which depends upon an *ex parte* proceeding under statutory requirements, that the courts will

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give to the patent greater effect than belonged to the certificate; that is to say, nothing more than *prima facie* evidence of title.

The answer I have given to your first question makes it unnecessary that I should answer the second and third questions.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

THE BARK MARIA AND JULIA.

Upon the facts of this case, it appears that the master of this vessel has not a present valid claim against this Government for the amount of the wages due him from the owners.

ATTORNEY GENERAL'S OFFICE,

September 19, 1866.

SIR: I have considered the question stated for my opinion in the matter of the claim of the master of the Spanish bark "Maria and Julia," libelled at Philadelphia for smuggling, and subsequently acquitted by decree of the circuit court. You have not furnished me with a very precise statement of the demand of the claimant; but I understand that it embraces a claim for the payment of the wages which had accrued to him as master of the vessel prior to her seizure, and also a claim for damages consequent upon the seizure of, and the proceedings against, the vessel.

The question submitted for my opinion touches only the validity of the demand for the payment of the master's wages.

The facts appear to be as follows:

The vessel was condemned by the district court on a charge of smuggling preferred against the master, but, pending the proceedings, and prior to the decree, was sold

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as perishable on account of chargeableness, and the proceeds of the sale brought into the registry of the court to abide the determination of the case.

This sale was made on the joint application of the law officer of the United States and certain creditors who had liens upon the vessel for supplies and materials furnished; which application, as the record of the district court affirmatively shows, was concurred in by the proctor and advocate of the owner, as well as the master of the vessel. The vessel brought at the marshal's sale less than the amount of the claims of the respective lien creditors. The district court decided that, whether the vessel was confiscable or not, these creditors were entitled, as against the United States, to payment out of the fund, and it accordingly decreed that distribution should be made of the whole fund (less the amount of the master's claim for wages) ratably among the creditors having liens for repairs, &c. The fund reserved in the registry of the court was held to abide the further decision of the court upon the master's claim for wages. The district court subsequently condemned the vessel, and dismissed the master's claim. From this decree an appeal was taken to the circuit court. That court, though certifying that there was probable cause for the prosecution, reversed the decree of condemnation, but reserved for further consideration the question of the right of the master to the fund reserved, as stated, in the registry of the district court, to abide the decision of his claim for wages. On further consideration of the case that question was decided against the master, and the decree of the district court dismissing his claim was accordingly affirmed. The ground on which the circuit court rested its decision was the superiority of the rights of the material men. Whether the master had or had not a right to the fund, as against the owners, he had no right as against those creditors; and the proceeds of the sale not being sufficient to pay the material men, the question as to the relative rights of the master and owners did not arise for decision.

I understand that the wages claimed amounted to

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$1,143 33, that is to say, less than $2,000. He has, therefore, it seems, no right of appeal to the Supreme Court of the United States.

Has he a present valid claim against this Government for the amount of the wages denied him by the highest court of the United States having jurisdiction of the case? It is plain that there can be no justice in the demand against the Government for the payment of these wages until it is shown that the master has lost them. This does not appear. Though it were clear that the master had, under the law of Spain, a lien on the vessel for his wages, and that his right was enforceable by a suit *in rem* in an American court of admiralty, he had and has no less the personal responsibility of the owners as security for the payment of his wages.

That security, for aught that appears, may be entirely ample; and it must, at least, be exhausted, or shown to be inadequate, before the party has any right to ask this Government to indemnify him. I express no opinion on any other question in the case. It is sufficient for me to say, that as the case now stands the claim for the payment of these wages should not be allowed by our Government.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

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REMOVAL OF INTRUDERS FROM INDIAN RESERVATIONS IN KANSAS.

The President has power, under the 2d section of the act of June 12, 1858, on the requisition of the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, to direct the military force to co-operate with the proper Indian agent in effecting the removal of intruders from the tribal reservations in Kansas.

ATTORNEY GENERAL'S OFFICE,
September 20, 1866.

SIR: I have considered the questions which arise upon the request made by the Secretary of the Interior that you will place at the disposal of the superintendent of Indian affairs for Kansas, a sufficient military force to effect the removal of intruders from the Indian reservations in that State. The first question arising is as to the authority for the employment of such a force for the purpose mentioned.

There can be no doubt that prior to the erection of a State government in Kansas, intruders were liable to be removed from the Indian reserved lands within its territorial limits by the military forces of the United States. The 10th section of the trade and intercourse law of 1834 expressly enacted that "the superintendent of Indian affairs, and Indian agents and sub-agents, shall have authority to remove from the *Indian country* all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal." (4 Stats., 730.) On recurring to the description given in the 1st section of the act of what constitutes, for the purpose of the law, the "Indian country," we find that it certainly included, before Kansas became a State, the lands therein which were reserved for the use and occupation of the Indian tribes. But it is very doubtful whether those lands were not excluded from the designation of "Indian country" when the State of Kansas was admitted into the Union. If, therefore, the

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act of 1834 were the only law which could be invoked as authority for the employment of a military force to remove intruders from these reservations, I should be of opinion that the authority did not exist. It is not, however, the only law which is to be considered as bearing upon the subject.

The 2d section of the act of June 12, 1858, expressly authorizes the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, to remove from *any tribal reservation*, any persons found therein without authority of law, and to employ for the purpose *such force as may be necessary* to enable the agent to effect the removal of such persons. (11 Stats., 332.) I am free to say, that if this provision were construed independently of the provision of the earlier act of 1834, to which I have referred, I should entertain grave doubt whether it authorizes the use of a military force to execute the power conferred on the officers of the Indian department. But it is well settled, that in construing a doubtful statute, and for the purpose of arriving at the legislative intent, all acts on the same subject-matter are to be taken together and examined, in order to arrive at the true interpretation. The 10th section of the act of 1834 and the 2d section of the act of 1858 are laws in *pari materia*, and so considering them, in giving construction to the later statutory provision, I am of opinion that Congress did not intend to confine the officers charged with the removal of intruders from tribal reservations to the employment of a civil force, but intended to confer upon them authority to make use of any force, of a military as well as of a civil character, that might be necessary to carry out the objects of the statute.

The phraseology of the provision in the act of 1858 is the same as that of most of the statutes authorizing the use of the army to aid in the execution of the laws. The expression is, "*employ* for the purpose such force as may be necessary." In the act of 1834, the authority is to direct "the military force to be *employed* in such removal."

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So we find the President is authorized, in the act of 1807, in regard to intrusions on the public lands, "to *employ* such military force as he may deem necessary and proper" to remove intruders from the lands of the United States. And again the expression occurs in sections 8th and 9th of the military act of 1818, which empowers the President to "employ" such part of the land and naval forces as may be necessary to execute that statute. There are other instances of this form of expression occurring in the statutes that might be mentioned, but these are sufficient to show that the word "employ," as used in the act of 1858, does not import the *hiring* of a force in aid of the officers to whom is committed the execution of the act. Congress, no doubt, intended to confer upon those officers authority to employ, for the removal of intruders from tribal reservations within the States, the same means that Indian agents were entitled to use in removing the same class of persons out of the "Indian country." When the territories west of the Mississippi became States, the lands within them to which the Indian title was not extinguished ceased to be designable as the "Indian country," for the purposes of the act of 1834. The removal of intruders from such lands could not, therefore, be effected in the manner and by the means provided in that act after they came within the jurisdiction of States. But the duty of the General Government to protect the Indians in their rights of occupancy, guarantied by treaty stipulation, was quite as imperative after their lands passed within the territorial limits of States as it was before; and in this view of the national obligation it was, I doubt not, that Congress passed the act of 1858, authorizing the employment of such force as might be necessary to remove all intruders from any tribal reservations within the jurisdiction and limits of the United States.

I am of opinion, therefore, that the President may lawfully, on the requisition of the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, direct the military force to co-operate with the proper In-

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dian agent in effecting the removal of intruders from the tribal reservations in Kansas.

The second question you state, namely, in what manner the military force should be employed for the purpose mentioned, appears to me to be sufficiently answered in my reply to your first inquiry.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War

CASE OF R. C. MASON.

The President has no power to restore property in the possession of a person claiming under a confiscation sale.

ATTORNEY GENERAL'S OFFICE,
September 27, 1866.

SIR: I have examined the case stated in the accompanying letter of Mr. R. C. Mason.

It appears that the farm in question has been sold under confiscation proceedings against his father, Dr. R. C. Mason, of Fairfax county, Virginia, and is now in possession of the person claiming under the sale.

Mr. Mason asks an order from the President, as "Commander-in-Chief" of the Army, for the restoration of this farm to Dr. Mason.

I am of opinion that the request cannot be complied with.

The question of title belongs exclusively to the civil tribunals, and if, as Mr. Mason claims, the confiscation proceedings were irregular and contrary to law, relief against them must be sought before a court having jurisdiction in the case.

I am, sir, very respectfully,

Your obedient servant,

The PRESIDENT. HENRY STANBERY.

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COLLECTION OF THE COTTON TAX.

The existing internal revenue laws do not authorize the consolidation of the cotton-growing States into a single collection district for the purpose of collecting the cotton tax.

ATTORNEY GENERAL'S OFFICE,
September 29, 1866.

SIR: I am in receipt of your letter of the 27th, requesting my opinion on the following point: "Whether the laws imposing a tax on cotton, and providing for its collection, so restrict the executive authorities as to forbid the arranging of the cotton States into a single cotton district, for the purpose of collecting the tax on cotton, having reference to the cotton tax only, and without necessarily involving any change of districts which may be most convenient for the collection of other taxes?"

I am clearly of opinion, that such a consolidation of the cotton-growing States as is described by the terms of the foregoing inquiry into a single collection district, for the purpose of levying and collecting the duties imposed by the internal revenue laws upon cotton, cannot lawfully be effected by executive authority under the existing provisions of these laws.

The authority conferred upon the President by the act of June 30, 1864, section 7th, "to alter the respective collection districts as the public interests may require," enables him only to modify, from time to time, as may be required, existing arrangements of the several districts designated by him for the levying and collection of all the duties and taxes prescribed and imposed by the acts of Congress relating to internal revenue. By the original act of July 11, 1862, the President was empowered simply to "divide, respectively, the States and Territories of the United States and the District of Columbia into convenient collection districts."

Soon after the passage of this act, a question arose as to

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the authority of the President to alter the arrangement of collection districts made and established by him in pursuance of this provision of law. That question was carefully considered by my predecessor, Attorney General Bates, who gave his opinion that the President, when he made the original division of the States into collection districts, exhausted his power in the premises. This was held on the general principle, that where an act of Congress, establishing a general system, confers on the President the authority to do a specific act for the purpose of perfecting the means by which the system shall be carried into effect, the act of the President, when performed according to the terms of the statute, has all the validity and authority of the statute itself. (10 Opinions, 469.)

This view of the law having been adopted by the Treasury Department, Congress was applied to for additional legislation conferring the authority which was not contained in the original act. The 7th section of the act of June 30, 1864, was accordingly enacted to remedy the particular defect which was found to exist in the statute of 1862.

It is too clear to admit of doubt, that "collection districts," within the meaning of the act, are those districts, respectively, in which the internal duties and taxes imposed by law upon all the subjects of taxation are collected in the manner and by the officers designated in the statute.

These districts cannot be established or arranged with reference to the duties imposed on particular subjects. That is not the plan upon which the internal revenue laws proceed.

Such an arrangement as is proposed in the memorials which you have submitted to me could not be carried into effect with the machinery established by existing law for the collection of internal duties.

The President has no power to appoint a special collector for the tax imposed on the particular article of cotton. Nor could he designate any one of the district collectors as the officer who should proceed throughout

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the entire cotton territory and collect the tax on that article wherever found.

The mischiefs of the present system complained of by the chambers of commerce of Mobile and New Orleans can only be remedied by Congress.

The act of July 13, 1866, to which reference is made by the memorialists, contains all the exceptional provisions as to the tax on cotton which Congress then deemed to be necessary; and those provisions, instead of giving authority to make the additional exception now requested, seem to me wholly inconsistent with it.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

SALE OF THE CHEROKEE NEUTRAL LANDS.

1. A power to sell, without further explanation, ordinarily implies a sale without credit, unless there is an established usage applicable to the subject-matter to the contrary.
2. The rule against a sale on credit is stronger, if the power to sell is at a fixed price.
3. Where an Indian treaty provided for a sale of lands by the Secretary of the Interior, to the highest bidders for cash, and also provided that he might sell the whole of the lands, not occupied by actual settlers, in a body, to any responsible party for cash, for a sum named per acre, it was *held*, that the Secretary had no power to sell otherwise than for cash in hand.
4. The provision for a responsible party is not inconsistent with the provision for a sale for cash.
5. The contract made by the Secretary of the Interior for the sale of the Cherokee neutral lands to the American Emigrant Company not being in conformity with the power of sale vested in him by the treaty with the Cherokee nation, ratified on the 31st of July, 1866, the department is advised to notify the company that it declines to carry the same into execution.

ATTORNEY GENERAL'S OFFICE,
October 4, 1866.

SIR: I have examined the provisions of the late treaty between the United States and the Cherokee nation of

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Indians, and the contract made between the late Secretary of the Interior and the American Emigrant Company, a corporation of the State of Connecticut, for the sale of certain lands, purporting to be made under the provisions of said treaty, and I proceed to answer the questions you propound upon this contract, which are as follows:

"1. Can a sale of the lands, either in separate parcels or in a body, be properly made under the treaty in advance of the survey of the lands provided for by the treaty?

"2. Can the whole of said lands be sold in a body upon a credit; or is it, under the provisions of the treaty, necessary to the consummation and validity of the sale that the whole of the purchase-money shall be paid in hand?

"3. Is the contract in harmony with and sanctioned by the provisions of the treaty, and can it lawfully be carried into effect, with due regard to the rights of Indians under the treaty?"

To avoid repetition, instead of answering these questions in detail and in the order in which they are presented, I propose, in a general answer, to cover all the ground.

You direct my attention especially to the 17th article of the treaty, and the proviso thereto, as amended by the Senate. I find this 17th article has so direct a bearing upon the questions under consideration, that I deem it proper to set it forth in full:

"The Cherokee nation hereby cedes, in trust to the United States, the tract of land in the State of Kansas which was sold to the Cherokees by the United States, under the provisions of the 2d article of the treaty of 1835, and also that strip of the land ceded to the nation by the 4th article of said treaty which is included in the State of Kansas, and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State.

"The lands herein ceded shall be surveyed as the public lands of the United States are surveyed, under the direction of the Commissioner of the General Land Office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee national council, and one by

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the Secretary of the Interior, and, in case of disagreement, by a third person, to be mutually selected by the aforesaid appraisers. The appraisement to be not less than an average of $1 25 per acre, exclusive of improvements.

"And the Secretary of the Interior shall from time to time, as such surveys and appraisements are approved by him, after due advertisement for sealed bids, sell such lands to the highest bidders for cash, in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value: *Provided*, That whenever there are improvements of the value of $50 made on the lands, not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such person so owning, and in person residing on such improvements, shall, after due proof, made under such regulations as the Secretary of the Interior may prescribe, be entitled to buy, at the appraised value, the smallest quantity of land, in legal subdivisions, which will include his improvements, not exceeding in the aggregate one hundred and sixty acres; the expenses of survey and appraisement to be paid by the Secretary out of the proceeds of sale of said lands: *Provided*, That nothing in this article shall prevent the Secretary of the Interior from selling the whole of said neutral lands in a body to any responsible party, for cash, for a sum not less than $800,000."

When the treaty was before the Senate, on the 27th of July, 1866, an amendment was made in these words:

"Strike out the last proviso in article 17, and insert in lieu thereof the following:

"'*Provided*, That nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of the treaty, not exceeding one hundred and sixty acres, to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre.'"

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As so amended, the treaty was finally ratified on the 31st day of July, 1866.

On the 30th day of August, 1866, an agreement in writing and under seal was made "between James Harlan, Secretary of the Interior, on behalf of the United States, of the one part, and the American Emigrant Company, a corporation chartered and existing under the laws of the State of Connecticut, on the other part." It is witnessed: "That the said Harlan agrees to sell, and hereby doth sell, to the said company all that tract of land known as the 'Cherokee neutral land,' in the State of Kansas, containing (800,000) eight hundred thousand acres, more or less, with the limitations and restrictions set forth in the 17th article of a treaty between the United States and the said Cherokee Indians, ratified on the 11th of August, 1866, as amended by the United States Senate, with all beneficial interest therein, at the rate of one dollar per acre, in lawful money of the United States, to be paid to the Secretary of the Interior, in trust for said Indians, as hereinafter set forth, viz: $25,000 on the execution hereof; $25,000 on the approval of the surveys of said lands by the Commissioner of the General Land Office; and $25,000 on the 30th day of August, 1867; $75,000 on the 30th day of August, 1868; $75,000 on the 30th day of August, 1869; and $75,000 on the 30th day of August, 1870; and $100,000 per annum thence afterwards until the whole shall be paid; each of said several sums to draw interest at the rate of five per cent. per annum from the date of the approval of the surveys, as aforesaid."

Next follow stipulations of the respective parties:

1. That the Emigrant Company are to make payment of these respective sums to the Secretary at Washington in lawful money of the United States as the same shall become due, and that the interest on the deferred payments shall be paid annually on the 1st of July.

2. That "the United States agree to cause said lands to be surveyed, as public lands are usually surveyed, in one year from the date hereof, and, on the payment of $50,000,

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to set apart for said company a quantity of said lands in one body in as compact form as practicable, extending directly across said tract of land from east to west, and containing a number of acres equal to the number of dollars then paid, and from time to time to convey the same by patent to said company or its assigns, whenever afterward requested so to do, in such quantities, by legal subdivisions, as said company shall indicate, and, on the payment of each additional instalment, with interest, as herein stipulated, to set apart for said company an additional tract of land, in compact form, where said company may request, but extending directly across the said neutral lands from east to west, containing a number of acres equal to the number of dollars of principal thus paid, and to convey the same to said company or its assigns, as hereinbefore described, and so on from time to time until the whole shall be paid, and no conveyance of any part of said land shall be made until the same shall be paid for as provided in this agreement; but said company may make payments at earlier periods than those indicated, or pay the whole, principal and interest, and receive titles of tracts of land accordingly, if they shall so elect."

I am of opinion, that this agreement cannot be sustained as a valid execution of the power of sale,

First, and especially as to the terms of payment. The power given to the Secretary to sell these neutral lands in a body provides for a sale for cash. The original proviso, in this particular, was identical with the amended proviso. Both authorized a sale for cash. The sale as made, except as to the sum of $25,000, is a sale upon credit, unusually extended as to time, by installments running through a period of about nine years.

Ordinarily a power to sell, without further explanation, implies a sale without credit, unless there is an established usage applicable to the subject-matter to the contrary. So, too, and more significantly, if the power to sell is at a fixed price. In this case it is expressly to sell for cash, and a minimum price is fixed.

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The only clause of this power that gives any color to a sale upon credit is the direction that the sale is to be made to any *responsible party*, for cash, &c. It may be argued that these words have no force, if there is to be no credit, as cash in hand does not require a responsible party. I have weighed this consideration, but cannot think it available. The sale or the contract of a sale of so large a quantity of land was not a matter to be completed in haste. It necessarily required time and communications between the parties. It was not to be a sale by auction, but upon proposals to be made, considered, modified, accepted, or rejected.

To enter upon so grave a business with a party of doubtful ability to comply with the terms when settled would be a useless waste of time. That alone would be a sufficient reason for requiring a responsible party.

But there is a special and more satisfactory reason for requiring a responsible party. It will be observed that the sale, according to the amended proviso, is to be for a sum not less than one dollar per acre. The number of acres in these neutral lands is nowhere stated in the treaty, and as the price depends upon the acreage, a survey to ascertain the true quantity was necessary to fix the amount of the purchase-money. I can see no objection to a contract for sale prior to a survey which would fix the price per acre upon a quantity to be ascertained by survey, and for the payment of the total amount so ascertained at that date. Such a sale would be in conformity with the power to sell for cash, for whenever sales are to be made of articles which require some fact to be ascertained, as of weight or number, and to be paid for at the stipulated price when the number or weight is ascertained, such sales are to be considered as cash sales, and not upon credit. In this view, the provision for a responsible party is not at all inconsistent with the provision for a sale for cash. It is not at all an unusual precaution in sales where no credit is contemplated to require a responsible bidder where cash is not payable at the moment of sale.

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Second. The next objection to this contract is that the sale is not, in fact, at the rate per acre required by the power. One dollar per acre, payable in installments extended through a number of years, with interest at the rate of five per cent., is in no sense, *as to value*, a sale at one dollar per acre in cash.

The value of money, as fixed by the United States, is at the rate of six per cent. per annum. That is the rate established upon judgments and debts falling due to the United States, and for credits given by the United States on the sale of the public lands. I do not know that anywhere in the United States the legal or established rate of interest is below six per cent. Everywhere that seems to be taken as the value of money. One dollar per acre, payable in long installments, with interest at five per cent., is neither cash, nor equal in value to one dollar per acre in cash. The objection is more apparent, if we put the case of a sale on long credit without any interest, but it is just as applicable to a sale at a rate of interest less than that established as the value of the use of money.

Third. This contract is subject to grave objections in the matter of the consideration or price to be paid for these lands. The treaty, as I have said, is silent as to the number of acres. In the first proviso, the power was to sell the whole for a sum not less than $800,000, without reference to quantity or price per acre, but by the amended proviso, the sale is to be for a sum not less than one dollar per acre. By the contract, which was made before any survey or any ascertainment of the number of acres, there is sold to the company "all that tract of land known as the Cherokee neutral land in the State of Kansas, containing 800,000 acres, more or less," "at the rate of one dollar per acre," and then follow the various installments, which foot up exactly the sum of $800,000.

I incline to the opinion that the construction to be put upon this contract is, that it is a sale at a fixed sum of $800,000, not to be increased or abated in reference to the actual quantity when ascertained by survey. I can see no

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reason for the statement of the quantity of acres with the addition of the terms "more or less," and the precise calculation of the installments upon a basis of 800,000 acres, at a dollar per acre, unless it was the intention of the parties to fix that sum as the actual consideration.

Fourth. There is no reservation in this contract of so much of these neutral lands as were occupied by actual settlers. The original proviso authorized the sale of the whole without any reservation, but by the amended proviso the power is to sell the whole of said lands not occupied by actual setlers. The sale, as made, is "all that tract of land known as the Cherokee neutral land," and no exception or reservation is anywhere stated, but instead there are these superadded words: "with all beneficial interest therein." It seems to me this is not a proper execution of the power. It is true, there is a reference to the limitations and restrictions set forth in the treaty. The objection is that the terms of the sale, as expressed, are inconsistent with those limitations, and cannot be brought into conformity with them.

I have, therefore, to advise you that this contract is not in conformity with the power of sale vested in the Secretary of the Interior by the terms of the treaty, and that you should give immediate notice to the Emigrant Company that you decline to carry it into execution.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. O. H. Browning,

Secretary of the Interior.

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THE METEOR

There is no law authorizing the Secretary of State to furnish the owners of this vessel with a letter of safe-conduct to the American ministers and naval officers in the East.

ATTORNEY GENERAL'S OFFICE,
October 4, 1866.

SIR: I have the honor to acknowledge the receipt of your letter of the 27th ultimo, covering a communication addressed to you by Mr. Thomas Walsh, from Boston, making two requests: 1st, that he may be indemnified for the detention of a certain vessel owned by him named the "Meteor;" and, 2d, that he may be furnished with a letter to the United States ministers in China and Japan, and to the commander of our squadron in the East, desiring them to see that the vessel be not interfered with during the prosecution of her voyage in those localities.

You ask me to inform you whether the law authorizes or requires any such proceeding on the part of the Government or your Department? I presume that the proceeding to which you refer is the one contemplated by the second request of Mr. Walsh. Indeed, I could not, with the information before me, express any opinion on the validity of his claim for indemnification.

As to the second request, I have only to say, that I am not advised of any law which authorizes you to comply with it.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

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COLLECTION OF BOUNTIES BY ATTORNEY.

The Secretary of War has no legal authority to exclude authorized attorneys and agents from collecting the bounties granted by the act of July 28, 1866.

ATTORNEY GENERAL'S OFFICE,
October 8, 1866.

SIR: I have considered the questions which you have referred to me "on the point whether the Secretary of War has legal authority to exclude authorized attorneys and agents from collecting bounties, and whether the presentations of claims and payments are to be made to the claimants in person."

I understand these questions to arise upon the late act of Congress, approved July 28, 1866, granting additional bounties, and upon the rules and regulations prescribed by the Secretary of War under the 15th section of that act.

Upon a careful examination of all the sections of the act which provide for the additional bounty, I find no provision which requires the claim for bounty to be presented by the claimant in person, or that requires the payment to be made to the claimant in person.

Certainly there is no express provision to that effect, and there is nothing from which it can be implied. It is true, the language is, that "the soldier," or, in certain cases, his widow, minor children, or parents, "shall be paid the additional bounty," and "that when application is made by any soldier for said bounty," &c. I do not infer an intention from the use of this language to require the soldier to make his application in person, or to receive the bounty in person; nor can I find any policy of the Government which, in these or similar cases, forbids the usual and convenient right of substituting an agent or attorney.

The same language which would require the soldier to make the application and collect the bounty in person is

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applied to his minor children, and if we hold it to be a matter requiring the personal attention and action of the soldier, we must inevitably apply the same rule to the infant children. But these can only act by the agency of others, such as guardians, executors, and administrators, and are incompetent to act for themselves. To construe this language so as to require their personal intervention would defeat the bounty intended for them until they should become *sui juris*.

Whenever the right to be asserted or recovered does not, from its very nature, require the actual personal intervention of the claimant, the right of substitution necessarily prevails.

This right is most valuable, and often absolutely necessary; and it seems to me that its denial in the matter of claims for bounties would, in many cases, totally defeat the claimant, and in nearly all cases lead to great expense and delay.

The bounty given by this act is not given to each soldier by name, in the way of an absolute gift, where nothing is to be done but only to demand it, but the persons who claim must prove their claims, and must exactly conform to various forms and regulations before they can touch the money.

The pursuit of a right to bounty is well called a claim, and might as well be called a suit. It is a right that is not acknowledged as of course. It must be established by proof made according to certain forms, and finally be adjudicated and allowed or rejected.

It is very analogous to a claim made in a court of law, especially to that class of suits which are *ex parte*, and in in general may just as much require the intervention of an attorney.

It is certain, that if this act should be construed so as to require every soldier and every child of a soldier to make the claim in person, and collect the money in person, comparatively few could avail themselves of the bounty of the Government.

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Before I could consent to put such a construction upon this act, I should require the clearest evidence that such was the intention of Congress. I find no evidence of that intention in this act, either expressed or so much as implied. Nor is there any public policy from which such an intention can be inferred. The statutes of the United States recognize such a class of persons as claim agents, who prosecute claims against the Government. They pay a license under the revenue act. Their fees are in some cases regulated by statute. They are required to take an oath of loyalty to the Government; and are punishable for frauds committed in the prosecution of claims.

Furthermore, as to all claims against the United States, whether allowed by special acts of Congress or arising under general laws or treaties, express provision is made for the payment of the claim to an attorney, and directions given as to the manner in which the warrant of attorney is to be executed. Under this general act, passed in 1846, and since amended and now in force, every claim against the Government may be prosecuted and collected by an attorney or claim agent; and any one who pays the license-tax, and takes the oath, may act as such claim agent, except only officers of the Government, persons employed in the executive departments, and members of Congress. I find also that by a joint resolution passed on the 20th of July, 1866, in relation to bounties and pensions to colored soldiers, the intervention of claim agents is recognized and the fees of agents who apply for and collect these claims are specially regulated, and the agent is required to make affidavit that he has no interest in the bounty beyond the fees for the collection of the same.

So far, therefore, as the public policy is concerned it seems clear, that by regulating the business and deriving a revenue from its exercise, as well as by express recognition, the intervention of claim agents is deemed lawful and expedient.

I am therefore of opinion, that you have no legal authority to exclude authorized attorneys and agents from col-

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lecting bounties; and that in the presentation and payment of claims the claimants may act by attorney.

I see nothing in the rules and regulations prescribed for the payment of these bounties which excludes the intervention of attorneys. They are silent on the subject. The form of affidavit prescribed, to be made by the soldier and referred to in the rules, contains this clause: "and he desires all communications concerning this claim to be sent to him."

This is no part of the oath, only a request, for the convenience of the soldier in the matter of correspondence, and is subject to change by another subsequent request even as to correspondence, and is not at all inconsistent with a special delegation to an attorney of power to present and collect the claim.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

CASE OF JEFFERSON DAVIS.

There is no impediment in the present condition of Virginia to prevent the full exercise of the jurisdiction of the civil courts in the case of this prisoner.

ATTORNEY GENERAL'S OFFICE,
October 12, 1866.

SIR: I have the honor to state my opinion upon the question propounded in your letter of the 6th, as to what further may be proper or expedient to be done by the Executive in reference to the custody of Mr. Davis and the prosecution for treason now pending against him in the circuit court of the United States for Virginia.

I am clearly of opinion that there is nothing in the present condition of Virginia to prevent the full exercise of the jurisdiction of the civil courts. The actual state of

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things, and your several proclamations of peace and of the restoration of civil order, guaranty to the civil authorities, federal and State, immunity against military control or interference. It seems to me that in this particular there is no necessity for further action on the part of the Executive in the way of proclamation, especially as Congress at the late session required the circuit court of the United States to be held at Richmond on the first Monday of May and the fourth Monday of November in each year, and authorized special or adjourned terms of that court to be ordered by the Chief Justice of the Supreme Court at such time and on such notice as he might prescribe, with the same power and jurisdiction as at regular terms.

This is an explicit recognition by Congress that the state of things in Virginia admits the holding of the United States courts in that State.

The obstruction you refer to, it seems to me, cannot be removed by any executive order. So far as I am advised, it arises as follows: Congress, on the 22d of May, 1861, passed an act providing that the circuit court of the United States for Virginia should be held at Richmond, on the first Monday of May and on the fourth Monday of November in each year, and further providing, that all suits and other proceedings which stand continued to any other time and place should be deemed continued to the place and time prescribed by the act. The special or adjourned session which was ordered by the court to be holden at Richmond in the present month of October was considered as abrogated by force of this act. This left the regular term to be holden on the fourth Monday of November, and if there had been no further legislation by Congress, no doubt could exist as to the competency of the Chief Justice and the district judge of that court then to try Mr. Davis. But on the 23d of July, 1866, Congress passed an act to fix the number of judges of the Supreme Court of the United States, and to change certain judicial circuits. Among other changes in the circuits made by this act is a change of the fourth circuit, to

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which the Chief Justice had been allotted. As this circuit stood prior to this act, when allotted to the Chief Justice, it embraced Delaware, Maryland, Virginia, North Carolina, and West Virginia. It was changed by this act by excluding Delaware and adding South Carolina.

It is understood that doubts exist whether this change in the States composing the circuit will not require a new allotment. Whether this doubt is well founded or not, it is certain that the Executive cannot interfere; for although, under peculiar circumstances, the Executive has power to make an allotment of the judges of the Supreme Court, yet these circumstances do not exist in this case. A new allotment, if necessary, can only be made by the judges of the Supreme Court or by Congress, perhaps only by Congress.

Mr. Davis remains in custody at Fortress Monroe precisely as he was held in January last, when, in answer to a resolution of Congress, you reported communications from the Secretary of War and the Attorney General, showing that he was held to await trial in the civil courts.

No action was then taken by Congress in reference to the place of custody. No demand has since been made for his transfer into civil custody. The district attorney of the United States for the district of Virginia, where Mr. Davis stands indicted for treason, has been notified that the prisoner would be surrendered to the United States marshal upon a *capias* under the indictment, but the district attorney declines to have the *capias* issued, because there is no other place within the district where the prisoner could be so safely kept, or where his personal comfort and health could be so well provided for. No application has been made, within my knowledge, by the counsel for Mr. Davis, for a transfer of the prisoner to civil custody.

Recently an application was made by his counsel for his transfer from Fortress Monroe to Fort Lafayette, on the ground, chiefly, of sanitary considerations. A reference was promptly made to a board of surgeons, whose report

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was decidedly adverse to the change, on the score of health and personal comfort.

I am unable to see what further action can be taken on the part of the Executive to bring the prisoner to trial. Mr. Davis must, for the present, remain where he is, until the court, which has jurisdiction to try him, shall be ready to act, or until his custody is demanded under lawful process of the federal courts.

I would suggest, that to avoid any misunderstanding on the subject, an order issue to the commandant of Fortress Monroe to surrender the prisoner to civil custody whenever demanded by the United States marshal upon process from the federal courts.

I send herewith a copy of a letter from the United States district attorney for Virginia, to which I beg to call your attention.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

The PRESIDENT

TEXAS INDEMNITY BONDS—CLAIM OF PEABODY & CO.

On the 24th of June, 1862, Messrs. Peabody & Co., of London, purchased in England, for full value, of a regular broker, accustomed to deal in American securities, a number of the bonds issued to the State of Texas by the United States under the act of September 9, 1850. These bonds had been turned over by the rebel authorities of Texas to the military board, so-called; had been placed by that board in the hands of an agent for sale in Europe, for the purpose of raising supplies for the rebel forces; and had been placed by said agent in the hands of a broker in London, of whom they were purchased by Messrs. Peabody & Co., without notice of the actual ownership of the bonds or of any fact to excite suspicion of their invalidity. *Held*, that the said bonds were existing valid obligations against the United States in the hands of the purchasers.

ATTORNEY GENERAL'S OFFICE,
October 15, 1866.

SIR: I have received your letter of the 27th ultimo, requesting my opinion whether certain bonds in the hands of

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Messrs. Peabody & Co., of London, are valid obligations against the United States.

The facts upon which this question arises are the following: The United States became indebted to the State of Texas in the sum of five millions of dollars, for which, by authority of Congress, five thousand coupon bonds, of one thousand dollars each, bearing date January 1, 1851, and redeemable after the 31st day December, 1864, were issued to the State of Texas. By each of these bonds it was certified that the United States were indebted to the State of Texas, or bearer, in the sum of one thousand dollars, redeemable after the 31st day of December, 1864, with interest at five per cent. per annum, payable semi-annually on the first days of January and July in each year, at the Treasury of the United States, on presentation and surrender of the proper coupon annexed, and that this debt was authorized by act of Congress approved September 9, 1850. It was further certified, that the bond was recorded in the office of the Register of the Treasury, and was transferable on delivery. The coupons attached were also payable to bearer for each sum of six months' interest.

At the beginning of the late rebellion, seven hundred and eighty-two of these bonds yet remained the property of the State of Texas, all the others having been disposed of by the State prior to that event. These were turned over by the rebel authorities of Texas to what was called the military board of the State. During the month of April, 1862, the military board placed three hundred of the bonds in the hands of an agent, to be taken to Europe and sold, the avails to be invested in supplies for the rebel forces then resisting the lawful authority of the United States.

In furtherance of the objects in view, these bonds were sent by the agent, Swisher, to his correspondents in England, who placed one hundred and forty-nine of them in the hands of brokers in London, of whom they were purchased by Messrs. Peabody & Co., on the 24th of June, 1862.

The purchase was made by Messrs. Peabody & Co. at full value, of a regular broker, accustomed to deal in American

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securities, and they had no notice of the actual ownership of the bonds, or of any fact to excite suspicion of their invalidity. It does not appear what use was actually made of the proceeds of these bonds, realized by the purchase of Messrs. Peabody & Co.

It is well settled as a principle of public law among civilized nations, that the state of war works no change in the relation of creditor and debtor between the citizens of the respective belligerents, beyond a mere suspension of the remedy. Upon the return of peace, the rights and obligations continue in force and the remedies which were in abeyance come again into full operation.

It is equally well settled that debts due by one of the belligerent States to the citizens of the other belligerent equally survive the termination of the war. The public faith is involved, and therefore the obligation on the part of the debtor State is said to stand upon a surer foundation than between individuals.

"The State," says Vattel, "does not so much as touch the sums which it owes the enemy. Money lent to the public is everywhere exempt from confiscation and seizure in case of war."

Nor do I find any act of Congress which invalidates these bonds.

The confiscation act of August 6, 1861, declares that all property which is used by the owner in aid of the rebellion shall be subject of prize and capture wherever found, and it is made the duty of the President to cause the same to be seized, confiscated, and condemned. If these bonds could be held to come within the purview of this act, it is sufficient to say, that no seizure or proceeding was taken against them at any time during the rebellion, nor since the restoration of peace.

The act of July 13, 1861, which provides for the forfeiture of all goods, chattels, wares, and merchandise taken in illegal traffic between the loyal and disloyal States, has no application to this case.

The remaining act requiring examination is the confis-

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cation act of July 17, 1862; and as to this it is only necessary to say, that its provisions for confiscation and forfeiture are all prospective, and could not apply to these bonds, which came into the hands of Messrs. Peabody & Co. *before* the passage of the act.

I have confined myself, in the consideration of these acts, to the most obvious reasons why they do not apply to this case. It is only necessary to say, in order to avoid future misconstruction, that I am not to be understood as holding, that if the objections stated were out of the way, these bonds would be invalidated by force of this legislation. I have not found it necessary to consider other grounds against the application of these acts to the case, such as the question whether the acts apply to a State or the property of a State, or whether they overrule the rights of a *bona fide* holder of negotiable securities.

I am therefore of opinion, that the bonds are existing valid obligations against the United States in the hands of Messrs. Peabody & Co.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH McCULLOCH,
Secretary of the Treasury.

VANCE'S CASE.

A warrant of extradition, issued under the 3d section of the act of August 12, 1848, is not a warrant of arrest.

ATTORNEY GENERAL'S OFFICE,
October 16, 1866.

SIR: I have received your letter of the 8th inst., requesting my opinion upon the following facts:

On the 5th of September, a warrant for the extradition of Robert Vance was issued by the Department of State. Vance was then in the custody of the United States mar-

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shal at Buffalo, under a warrant for his apprehension as a fugitive from justice, issued in accordance with the act of August 12, 1848, "for giving effect to certain treaty stipulations between this and foreign Governments for the apprehension and delivery up of certain offenders." In consequence of some delay in the appointment of an agent to receive the prisoner, he was discharged from custody, according to the 4th section of the act above referred to. He is now at large; and the question you submit for my opinion, at the instance of the marshal, is, whether he can be again arrested under your warrant for extradition?

I am clearly of opinion that he cannot. According to the 3d section of the same act, which provides for the warrant of extradition, its exigency is merely for the delivery of the person committed to the person or persons authorized to receive him for the purpose of extradition. It is in no sense a warrant for arrest, and cannot be used for the purpose of arrest. If a new arrest is to be made, it must be upon another proceeding, before a judicial officer or commissioner, under the 1st section of this act.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

THE MACON ARMORY PROPERTY.

The institution of proceedings against real property, under the confiscation act of August 6, 1861, waives any claim on the part of the United States of title by conquest.

ATTORNEY GENERAL'S OFFICE,
October 5, 1866.

SIR: I have the honor to acknowledge the receipt of your letter of the 10th of September last, requesting that, if in my opinion a complete title to certain property in

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Macon, Georgia, is not already vested in the United States, I will direct such proceedings to be instituted as may be necessary for the purpose of having the title perfected.

It seems that in 1862 a part of a certain common, the corporate property of the city of Macon, was by the mayor and councils conveyed to the so-called Confederate States by deed in due form, duly recorded, "in testimony of the patriotic devotion of the people of Macon," &c., "as well as with a view to the benefit likely to arise from the establishment of an armory in Macon, and in further consideration of five dollars," &c.

The Judge Advocate General is of opinion that the United States have a completely valid title to the property by conquest.

I do not think, however, that it is necessary for me to consider that question under the present reference.

The United States is in possession of the property, I understand; and, in so far as the operation of the law of war may be concerned, the title is as perfect now as it can ever become.

The property, however, may be liable to confiscation under the act of August 6, 1861, which subjects to seizure and condemnation all property given or sold, bought or acquired, by any person, with intent to use the same, or suffer the same to be used, in aid of the rebellion.

In respect to the institution of proceedings under that statute, the first objection that occurs to me is, that it waives the claim of title by conquest. Furthermore, on the filing of the information, the property would pass at once into judicial custody, and continue in such custody until the determination of the cause. If the land were condemned, the marshal would be directed to sell the same to the highest bidder, and at such sale the Government would stand on the footing of any other bidder. It would not be entitled to the possession of the property until it was stricken off to it, and a deed from the marshal was executed and delivered under the order of the court.

You will perceive, however, that such a proceeding might

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eventuate in a decree of restoration to the claimants, and that, even if the property should be condemned, the claimants or a third party might acquire it at the marshal's sale. In this view of the nature of the procedure under the statute mentioned, and of the possible results of such procedure, I do not think that I can safely direct judicial proceedings against the property.

I do not wish to be understood as affirming the confiscability of the property under the act of 1861, or the application of that statute to the case.

I mention that law, as it is the only one known to me under which an allegation of forfeiture could probably be framed.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

TEXAS INDEMNITY BONDS—CLAIM OF MESSRS. MILLS.

The twenty-five Texas indemnity bonds held by Messrs. R. & D. G. Mills, of Galveston, are valid obligations in their hands against the United States, upon the principles stated in the opinion in the case of Messrs. Peabody & Co., of London.

ATTORNEY GENERAL'S OFFICE,
October 29, 1866.

SIR: I have had under consideration the question submitted by your letter of the 26th ultimo, touching the validity of certain Texan indemnity bonds presented for payment by Messrs. R. & D. G. Mills, of Galveston, Texas.

These bonds, twenty-five in number, are parcel of a series of five thousand issued by the United States to the State of Texas, under the following circumstances:

The United States became indebted to the State of Texas in the sum of $5,000,000, for which, by authority of Congress, five thousand coupon bonds, of $1,000 each,

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bearing date January 1, 1851, and redeemable after the 31st day of December, 1864, were issued to the State of Texas. By each of these bonds it was certified, that the United States were indebted to the State of Texas, or bearer, in the sum of $1,000, redeemable after the 31st day of December, 1864, with interest at five per cent. per annum, payable semi-annually on the 1st days of January and July of each year, at the Treasury of the United States, on presentation and surrender of the proper coupon annexed, and that this debt was authorized by act of Congress approved September 9, 1850. It was further certified, that the bond was recorded in the office of the Register of the Treasury, and was transferable on delivery. The coupons attached were also payable to bearer for each sum of six months' interest.

Prior to the late rebellion, the State of Texas had disposed of the greater part of these bonds, but some of them were still owned by the State, and among others the twenty-five now in question.

In the early part of 1862, this firm of R. & D. G. Mills, then engaged in business in Texas, and citizens of that State, came into possession of two hundred of these bonds, one hundred of which came to them from the Southern Pacific Railroad Company, the other hundred from an agent of the rebel confederate government.

By some arrangement between that rebel government and the Governor of Texas, the last-mentioned hundred bonds were delivered to the agent of that government, to be used for the benefit of the rebel government, and they were placed in the hands of this firm to be so used.

The firm remitted twenty-five of them to London, to be there sold for the use of the rebel government. After this remittance, and before any sale, Governor Lubbock, of Texas, applied to the firm for the re-delivery of the bonds so placed in their hands by the agent of the rebel government. The bonds then remaining in their hands were delivered over to Governor Lubbock, and in lieu of the twenty-five which they had remitted to London the same

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number of their own bonds, purchased by them of the Pacific Railroad Company, were delivered to Governor Lubbock. By this arrangement they became the owners of the twenty-five bonds in London, which were reclaimed by them, not having been sold: and these are the bonds now presented for payment.

Their ownership is not disputed by the State of Texas or any other party. No proceedings in confiscation have at any time been instituted against these bonds, and it is stated that the members of the firm have received pardons from the Executive of the United States.

In a recent opinion, which I had the honor to submit to you in the matter of the application of Messrs. Peabody & Co., for payment of certain other of these Texan indemnity bonds, I took occasion to consider the questions of public law and those arising under our confiscation acts in reference to these bonds. My conclusion upon the facts in that application was, that the liability of the United States to pay these bonds, though suspended during the rebellion, came into full effect after pacification.

Upon a careful review of the facts in the case under consideration, I am of opinion that the twenty-five bonds belonging to Messrs. R. & D. G. Mills are valid obligations in their hands against the United States.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH McCULLOCH,

Secretary of the Treasury.

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PRESIDENT'S PARDON.

The effect and operation of a pardon issued by the President stated.

ATTORNEY GENERAL'S OFFICE,
November 2, 1866.

SIR: The effect of a pardon is to discharge a person from all penal disabilities which attach by law to the offence pardoned. It is co-extensive with the punishing power, and is applicable to the remission of fines, penalties, and forfeitures which are imposed by law as punishment for offences. There is no offence when the crime is pardoned, and there cannot be any penalty imposed for it.

The form of pardon granted by the Executive to persons engaged in the late rebellion does not restore them, by its own operation, to any property, or the proceeds of any property, sold under a judgment or decree of confiscation.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

The PRESIDENT.

VICE ADMIRAL'S PAY AS SUPERINTENDENT OF THE NAVAL SCHOOL.

The pay of the vice admiral of the navy, while acting a superintendent of the naval school, is at the rate allowed him for services at sea by the act of December 21, 1864.

ATTORNEY GENERAL'S OFFICE,
November 5, 1866.

SIR: I have the honor to acknowledge the receipt of your letter of the 30th ultimo, asking my opinion on the question as to the pay allowed by law to the vice admiral of the navy while discharging the duty of superintendent of the naval school at Annapolis.

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Pay of Superintendent of Naval School.

The pay of the vice admiral of the navy, as fixed by the act of December 21, 1864, is $7,000 when "at sea," $6,000 when on "shore duty," and $5,000 when "waiting orders."

The act of September 28, 1850, provides, that "the pay of the superintendent of the naval school at Annapolis shall be at the rate allowed to an officer of his rank when in service at sea."

The question you submit for my opinion is, Whether an officer of the rank of vice admiral, who may be superintendent of the naval school, shall receive, while holding that position, the pay allowed him "when at sea," or that given him "when on shore duty?"

I have no hesitation in saying, that as to the pay of the vice admiral while acting as superintendent, the act of 1850 continues in force, and that he is entitled to receive as pay for such service the rate allowed him for service at sea by the act of 1864.

In respect to officers of the navy, Congress has, from time to time, regulated their pay according to the nature of the service in which they were engaged, having special regard to sea service, shore service, leave of absence, or waiting orders.

When the grade of rear admiral was established by the act of July 16, 1862, the same distinction as to pay was kept up, viz: at sea, $5,000; on shore duty, $4,000; on leave of absence or waiting orders, $3,000.

So, too, when the grade of vice admiral was established by the act of December 21, 1864, the same rule was adopted, and one rate of pay fixed for service at sea, another for shore duty, and another when waiting orders.

Inasmuch as the act of 1850 expressly fixes the pay of the superintendent at the rate allowed him, according to his grade, for sea service, that must be the rule, unless it is repealed by the act of 1864.

Certainly there is no express repeal, and I feel very clear there is no repeal by implication. I will state as briefly as possible the grounds on which this opinion is founded,

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keeping in view the well-established rule that repeals by implication are not favored, especially when the two statutes supposed to be inconsistent are susceptible of a construction which will allow due effect to both.

1. The Congress saw fit to distinguish by special enactment the service of superintendent of the naval school from all other shore service, and to place it on a footing with the highest rate of service, that is to say, sea service.

That particular service, though in fact shore service, is, as to pay, in legal estimation, sea service. No doubt there was good reason for this special favor, in order to give dignity and efficiency to an institution upon which the well being of the navy so much depends.

2. If we hold the provision as to shore service, when applied to the vice admiral, to cover and regulate his pay as superintendent, we must necessarily apply the same rule to the rear admirals and all other officers as to whom there is a regulation as to pay for shore service; thus, in effect, totally frustrating the special rule adopted in the act of 1850, and sinking the pay of the superintendent to the common level of shore service.

3. If we so construe these statutes as to make the regulation for pay for shore service general, and the regulation of pay for the superintendent special and exceptional, we shall adopt a construction which makes them fully operative and harmonious.

I am accordingly of opinion, that the pay of the vice admiral, while discharging the duty of superintendent, is regulated by the act of 1850.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. GIDEON WELLES,

Secretary of the Navy.

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BONDS OF THE DELAWARE INDIANS.

The moneys payable by the bonds and coupons issued by the Leavenworth, Pawnee, and Western Railroad Company, in favor of the Delaware tribe of Indians, pursuant to the treaty ratified by the President on the 4th of October 1861, may be lawfully paid in legal-tender treasury notes.

ATTORNEY GENERAL'S OFFICE,
November 7, 1866.

SIR: I have received your letter of the 24th ultimo, in which you request my opinion on the following facts:

By the third article of the treaty between the United States and the Delaware tribe of Indians, concluded at Sarcoxieville on the 30th of May, 1860, the United States assented to the wishes expressed by the Indians, that the Leavenworth, Pawnee, and Western Railroad Company should have the preference in the purchase of certain lands embraced within the reservation of said tribe, upon the payment by the company of the appraised value thereof within a specified time, and in gold and silver coin.

The lands, amounting to two hundred and twenty-three thousand nine hundred and sixty and seventy-eight hundreths acres, were duly surveyed and appraised at the sum of $286,742 15. The company, having become the purchaser, failed to make payment according to the contract, and the same became forfeited. If the money had been paid for the lands under the contract, it would have been the duty of the United States, as trustee for the Indians, to invest it in safe and profitable stocks.

On the 10th of June, 1861, Mr. Lincoln, then President of the United States, being of opinion that it was expedient and for the interest of the respective parties that the sale to said railroad company should not be allowed to fail, and in order to carry out the final purpose of investment of the proceeds in good and profitable stocks, entered into a new arrangement with the railroad company, stipulating that the company should execute their bonds, with interest warrants or coupons attached, amounting in the aggregate of

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principal to the said sum of $286,742 15, to be secured by a mortgage on one hundred thousand acres of said land. The bonds were to be according to a form stipulated in the agreement, by which the railroad company acknowledged themselves to be held and bound to the United States, as trustee for the Delaware tribe of Indians, for so much money as was stated in each bond, to be paid to the Commissioner of Indian Affairs or bearer, at the office of the assistant treasurer of the United States, in the city of New York, in ten years from the date of the bond, on the surrender of the bond, with interest on said sum, from the same date, at six per cent. per annum, payable annually at the same office, on the surrender, as they severally fell due, of the annexed interest coupons, each bond being one of twenty-nine bonds for sums amounting in the aggregate to $290,560, the payment of which, with the interest warrants attached, was secured by mortgage of even date on one hundred thousand acres of the land acquired by said company under the conditions and provisions of the treaty between the United States and the Delaware tribe of Indians of May 30, 1860. The date of the bonds is the 14th of May, 1861. The form of the interest warrant is also given, by which the company promise to pay the specified interest to the Commissioner of Indian Affairs of the United States, or bearer, at the office of the assistant treasurer of the United States in the city of New York.

On the 6th of August, 1861, the Senate ratified this new agreement, upon the condition that it should not go into operation until accepted by the Indians as an amendment to the former treaty. This acceptance was formally given by the chiefs, counsellors, and head-men of the Delaware tribe of Indians on the 2d of September, 1861, and afterwards, on the 4th of October, 1861, the President did accept, ratify, and confirm said treaty, with the amendments aforesaid, in pursuance of the ratification so given by the Senate and the acceptance thereof by the Indians.

The question arising on this state of facts which you submit for my opinion is, Whether the moneys payable by

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these bonds and coupons may be lawfully paid in United States Treasury notes, commonly called greenbacks?

I take it for granted that the act of Congress of February 25, 1862, which provides that these notes shall be lawful money and a legal tender in payment of all debts, is valid. I do not understand your question is intended to raise that point, but if it was so intended, I have only to say, that I am of opinion that this provision is valid and constitutional.

The inquiry remaining is, Whether the act applies to the bonds and coupons in question? Two questions are understood to arise here—

1. Whether the provision in the first treaty, that the purchase-money of the lands should be paid "in gold or silver coin," applies to the bonds and coupons made under the second treaty.

2. If not, then whether the provisions of the act as to legal tender apply to contracts made prior to its passage.

As to the first question, I am clearly of opinion, that the bonds and coupons executed under the second treaty, are as to their construction and legal effect, entirely independent of the first treaty; so that if the provision in the first treaty, that the money should be paid in gold or silver coin would, if applied to these bonds and coupons, change their legal effect, it cannot be so applied. It is true there is a clause in the second treaty to the effect that, as to matters not varied by the second treaty, the same should "proceed" in conformity with the first treaty. But as to the terms of the contract for the payment of the purchase-money, they were varied by the second treaty, if a contract to pay money in gold and silver, made in 1860, is varied from a contract to pay money, without specifying the medium, made in 1861.

I am not prepared to say that, if the money payable under the second treaty had been expressly made payable in gold or silver coin, and so stated in the bonds and coupons, their legal effect would have been changed, or

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the conclusion to which I have arrived would have been modified.

I prefer, however, to place my opinion upon the ground that the bonds and coupons are in no way affected by the provision contained in the first treaty as to the medium in which payment is to be made.

The only question which remains is, whether the legal-tender act applies to debts created prior to its passage.

The intention of the act is clear, for the language is that the Treasury notes shall be "a legal tender in payment of all debts." There is no exception of debts theretofore contracted, and I see no ground upon which such an exception can be placed. The obligation of the contract is not impaired, for the Treasury notes made a legal tender are, in legal estimation, of equal value with coin. The obligation of contracts must be understood as subject to changes in the public policy as to the currency, and the legitimate medium for payment of debts.

I am, accordingly, of opinion, that the bonds and coupons in question may be lawfully paid in the United States Treasury notes made a legal tender.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. O. H. BROWNING,
Secretary of the Interior.

INFORMERS' SHARES.

In the case of moneys paid after August 1, 1866, in lieu of fines, penalties, and forfeitures, without suit, or before judgment, in pursuance of compromises made before that date, the informers are only entitled to share according to the provisions of the act of July 13, 1866.

ATTORNEY GENERAL'S OFFICE,
November 9, 1866.

SIR: I have considered the questions propounded in your letter of the 23d ultimo. They arise upon the provisions

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of the act of July 13, 1866, amending section 179 of the internal revenue act of June 30, 1864, and authorizing the Secretary of the Treasury to provide by general regulations for the shares payable to informers, of moneys paid without suit or before judgment after suit, in lieu of fines, penalties, or forfeitures.

The controlling point for consideration is presented in the third question.

The question is, Where a compromise is made before August 1, when the act of 1866 took effect, but payment is not made till after that time, under which law does the informer share; the former or the present?

The 179th section of the former act of 1864 conferred upon collectors moieties of all fines, penalties, and forfeitures, not otherwise provided for, which were sued for and recovered in the name of the United States, if they had first informed of the cause whereby the same were incurred, (13 Stats., 305.) By an amendment contained in the act of March 3, 1865, the right to moieties of such fines and forfeitures was conferred upon any persons who should first inform of such cause, and by a further amendment of the 179th section, the Secretary of the Treasury was authorized to pay a moiety of any penalty, received without suit or before judgment, to the proper informer, (*Ibid.*, 483.) It would seem, therefore, that prior to the amendment of 1865, in cases of penalties paid before judgment or without suit, the entire fund went to the United States, and that the object of the provision contained in the act of 1865 was to enable the Secretary of the Treasury, where, after suit and before judgment, or where, before any suit at all, a penalty was paid by the party liable therefor, to distribute the amount in equal parts to the United States and the informer.

By the proper construction of this amendatory provision in the act of March 3, 1865, no right vested in the informer before the penalty was *paid*. The interest is conditional upon the payment of the penalty without suit or before judgment, and when the condition is complied with, and

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the penalty paid, then, for the first time, the interest of the informer vests. The same construction was given by the Supreme Court to a statute conferring in much stronger terms a similar right. The act of 1793 gave a penalty of $500 to the claimant of a fugitive slave, recoverable against any party obstructing his arrest. A suit had been brought in a particular case for the recovery of the penalty, and, while the suit was pending and before judgment, Congress repealed the act of 1793. The Supreme Court held, that as the plaintiff had no vested interest in the penalty, the legislature might discharge the defendant by repealing the law. (Norris *vs.* Crocker, 13 How., 440.)

The Supreme Court, in the earlier case of The United States *vs.* Morris, (10 Wheat., 290,) elaborately considered the nature of the rights and interests of the custom-house officers in forfeitures and penalties incurred under the foreign revenue collection laws. The decision was, that before as well as after judgment of condemnation those rights and interests were subordinate to the authority of the United States over the subject, and that they did not vest and become absolute until the proceeds were actually received for distribution. So that at any time before the receipt of the moneys it was competent for the Government to intervene, by remission or otherwise, and withdraw or modify the gift *ad libitum*.

The interests of informers under the 179th section of the internal-revenue act of 1864, as amended by the act of 1865, are not different in legal quality from those rights which were considered and defined by the Supreme Court in this case. The scope and policy of the statutes by which they were respectively conferred are the same. They are equally held subordinate to the authority of the United States over the subject, and conditional on any exercise of that authority which may be deemed wise up to the time when the proceeds are realized and ready for distribution.

The intention of Congress in the declaratory enactment in the recent law, presently to be referred to, was undoubtedly to incorporate the principles of the adjudication in

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the case of United States *vs.* Morris into the internal-revenue code. But, independently of that provision, the scope and policy of the 179th section of the act of 1864 are subject to the same construction as in that case was given to the laws conferring upon custom-house officers interests in forfeitures *in rem* and personal penalties.

If, then, no absolute right was vested in the informers by the acts of 1864 and 1865, where penalties were obtained before judgment or without suit, until the receipt of the moneys, it was entirely competent for Congress, at any time before the actual payment of the penalties, to change the rule of distribution, and give a less interest to informers than was conferred by the antecedent law. There is nothing, therefore, which can prevent the rule of distribution provided in the act of 1866 from having effect in the cases of penalties paid after its passage, without suit or before judgment, though upon compromises made before its passage, if it was the intention of Congress that the new rule should prevail in those cases.

On that point, the intention of Congress is clearly expressed in the declaratory provision, that it is the true intent and meaning of all provisions of internal-revenue acts, granting shares to informers, that no right accrues to, or is vested in, any informer in any case until the fine, penalty, or forfeiture in such case is fixed by judgment or compromise, and the amount shall have been paid. The act of 1866 substitutes a new and different rule of distribution for the one provided in the previous law, and that rule must operate upon all subsequent cases, as well as upon all cases which were not consummated by payment of the moneys until after the date of the act, though their inception was anterior to its passage. My remarks are, of course, restricted to cases which had not proceeded to judgment before the time when the act of 1866 went into effect. Whether the rule of the statute of 1866 should prevail in cases where judgments were obtained before that time, will be a judicial question whenever it arises, and on that question I express no opinion.

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The only point intended to be determined in this opinion is, that where compromises are made under which moneys are payable in lieu of forfeitures *in rem* or personal penalties, whether before judgment or without suit, no absolute interest is vested, under the legislation referred to, in the informers, until the compromises are executed by payment of the amounts.

I am therefore clearly of opinion, that in the case of moneys paid after August 1, 1866, in lieu of fines, penalties, and forfeitures, without suit or before judgment, and in pursuance of compromises made before that date, the informers are only entitled to share according to the provisions of the act of July 13, 1866.

It seems to me that the preceding remarks render unnecessary any reply to the first two inquiries made in your letter.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

BOUNTY OF COLORED SOLDIERS.

Colored soldiers who were slaves at the time of entering the military service are entitled to the bounty provided for in the 12th and 13th sections of the act of July 28, 1866.

ATTORNEY GENERAL'S OFFICE,
November 13, 1866.

SIR: I have the honor to state my opinion upon the question propounded by yours of the 9th instant, "Whether, under the act of Congress of July 28, 1866, making appropriations for sundry civil expenses of the Government for the year ending June 30, 1867, and for other purposes, colored soldiers in the military service of the United States, who were slaves at the time of entering said service, are entitled to any and what bounty."

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In the opinion furnished to you from this office, under date of September 7, 1866, a similar question was considered in reference to certain soldiers enlisted in the regular army of the United States between the 14th of April, 1861, and the 1st of July, 1861, as to whom no provision for bounty had been made prior to the act of July 28, 1866. This class of soldiers had been excluded by the board of officers appointed by you to frame rules and regulations for the payment of bounties. I beg leave to make the following extract from that opinion:

"It is true that no previous law gives a bounty to regular soldiers enlisted between the 14th of April, 1861, and the 1st of July, 1861. The act of July 22, 1861, which provided for the first bounty to volunteers, did not include regulars. It was, however, provided by the act of July 29, 1861, that the men enlisted in the regular forces after the 1st day of July, 1861, shall be entitled to the same bounties, in every respect, as those allowed, or to be allowed, to the men of the volunteer forces.

"Now, the question is whether those soldiers who enlisted in the regular army between the commencement of the war and the 1st day of July, 1861, are intended to be excluded by the provisions of the act now under consideration.

"The board so construe the law as to make it an indispensable qualification for the bounty that the soldier has already received at least $100 of bounty, and to declare that the receipt of bounty in excess of $100 works a disqualification. No doubt that, as to the disqualification, the board is perfectly correct. If the soldier has received more than $100 bounty, he does not come within the purview of this section. Such excess over $100 is taken to have sufficiently compensated him for his services.

"But we must reverse this policy if we hold that the purpose was also to exclude the soldier who has not received quite $100, or who has received nothing at all. Certainly it would require very stringent language to work such a result as that. I agree that if we read the words

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used in a strictly literal sense we would reach the result, 1st, exclusion of the soldier who had received more than $100, because it was too much; and, 2d, who had received less than $100, because it was too little. It is just because such a result would follow from a literal construction that we are to avoid a literal construction.

"Looking, then, to the spirit and meaning of this law, the only exclusion that seems to me to have been intended is of those soldiers who have already received a greater bounty than $100."

Your question presents for consideration another class of soldiers, who may not have received any prior bounty; that is to say, colored soldiers, who were slaves at the time of entering the service. The construction put upon the act of 1866 in the prior opinion which has been quoted, seems to me to cover the case of these soldiers, and to bring them within its benefits. I have reconsidered that opinion, and am confirmed in the belief that it is in accordance with the intention of Congress. That act gives to "each and every soldier who enlisted in the army of the United States, after the 19th day of April, 1861, for a period of not less than three years, and, having served the time of his enlistment, has been honorably discharged, and who has received, or who is entitled to receive, from the United States, under existing laws, a bounty of $100 and no more," an additional bounty of $100. There is also a similar provision for every soldier who enlisted for a period of not less than two years, except that such soldier is only to be entitled to an additional bounty of $50.

In the first place, it is clear that these provisions for bounty were intended to be very comprehensive. They embrace each and every soldier, without distinction of color. Then, next, it is evident that the bounty is given for actual service and honorable discharge, and as to the amount it is graduated according to the length of service. This length of service, coupled with honorable discharge, are the considerations upon which this bounty of the Government proceeds.

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If the section stopped here, it would embrace all soldiers, white and colored, who had already received greater compensation in the way of bounty than $100. The evident purpose was only to limit this recognized consideration for bounty within what was considered reasonable bounds.

If more than $100 had been received, the clear intention is that the additional bounty shall not be paid. At the same time, $100 was not considered sufficient even for two years of such service, and therefore, as to the soldier who had served three years, and as yet had received but $100, the intention was to give him $50 additional. This, beyond question, was the policy and purpose of the act.

I think we may very well read the act as if the language of exclusion was, "who has not yet received a bounty of more than $100." When we consider that in these provisions Congress intended to compensate every soldier, after honorable discharge, for actual service, I do not see how such intention can be made to conform to an exclusion of the meritorious soldier who has rendered the stipulated service, and has been honorably discharged, from receiving this last bounty of the Government, simply because heretofore the Government has failed to make him any compensation.

To carry out the exclusion, we must suppose that Congress had in view two classes of soldiers, who stood upon equal grounds as to merit in respect to time of service and of honorable discharge from the service: and as to one class, who have received $100 and no more, they are to be paid a further consideration, while as to the second class, who have received nothing, they are to be left without any compensation at all.

We are not to forget the nature of these provisions. They are to carry out the bounty of the Government for meritorious services performed, and are therefore to receive a most liberal construction.

Such just purpose should not be disappointed.

Entertaining these views, I deliberately adhere to the opinion heretofore given, and answer your question, that

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such soldiers are entitled, according to the length of their service, to the bounty provided for in the 12th and 13th sections of the act to which you refer.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

COMPENSATION FOR ENLISTED SLAVES.

No award can be made, under the 2d section of the act of July 28, 1866, to the persons enlisted as slaves.

ATTORNEY GENERAL'S OFFICE,
November 13, 1866.

SIR: I have the honor to state, in answer to your letter of the 9th instant, that I am opinion that no award can be made under the 2d section of the act of July 28, 1866, to the persons enlisted as slaves.

The awards are limited to the loyal owner or master, and the express language of the act extends the right of compensation to such owners or masters of drafted slaves, as well as of slaves who are volunteers.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

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WARD'S CLAIM.

This claim of a resident of Norfolk, Virginia, for supplies furnished the Navy Department, may now be lawfully paid.

ATTORNEY GENERAL'S OFFICE,
November 21, 1866.

SIR: I have the honor to state, that I have had under consideration the claim of William Ward, of Norfolk, Virginia, referred by you for my opinion, whether it can now be lawfully paid by the proper department.

It appears that there is standing to the credit of Mr. Ward, on the books of the Bureau of Provisions and Clothing of the Navy Department, on his contract for fresh beef and vegetables, on the Norfolk station, for the fiscal year ending June 30, 1861, the sum of $3,081.

The Secretary of the Navy states that the claim appears to be correct, and that the Navy Department has been ready to make payment to the proper party whenever the President may so order. The Secretary adds, that payment of this claim was originally suspended by order of President Lincoln, as were all claims within the rebel States, unless the claimants would accept drafts on the assistant treasurers within those States.

It is further stated, that the claimant, though a resident of Norfolk, has never been disloyal, and it does not appear that any proceedings in confiscation have at any time been commenced against him, or any of his property or credits.

In this state of facts, I can see no valid reason for a further suspension of payment of the amount so admitted to be due; and I am of opinion that such payment may now be lawfully made.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

The PRESIDENT.

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COMPENSATION OF CONSULAR AGENTS.

1. The 3d section of the act of June 15, 1866, is limited to unsalaried consuls and commercial agents.
2. Consular agents are entitled to the compensation allowed them under the 15th section of the act of August 18, 1856.
3. The fees of consular agents, receivable under the act of 1856, are not returnable in the accounts of the consuls, to whom they are subordinate, under the act of 1866.
4. The fees collected by consular agents, which are payable under the act of 1856 to their principals, are returnable in the accounts of such principals.

ATTORNEY GENERAL'S OFFICE,
November 22, 1866.

SIR: I have considered the questions which you have stated as arising upon the 3d section of the act of July 25, 1866, making appropriations for the consular and diplomatic expenses of the Government for the year ending June 30, 1867, and for other purposes.

That section provides as follows: "That all fees collected by any consul or commercial agent not mentioned in schedule B or C, by any vice-consul or commercial agent appointed to perform their duties, or by any other person in their behalf, shall be accounted for to the Secretary of the Treasury in the same mode and manner as is provided for in section 18 of the act approved August 18, 1856, entitled 'An act to regulate the diplomatic and consular system of the United States.' And when the fees so collected by any such consul or commercial agent amount to more than $2,500 in any one year, over and above expenses of office-rent and clerk-hire, to be approved by the Secretary of State, of which return shall be made to the Secretary of the Treasury, the excess for that year shall be paid to the Secretary of the Treasury in the mode provided for by said act."

The first question which you state is, whether, under this provision, the fees collected by a consular agent are to be considered as his own fees, or as forming a part of

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those collected and returned by the principal consular officer by whom he is nominated and to whom he is subordinate? I do not think that consular agents are embraced at all by the 3d section of the act of 1866. Their compensation is still, in my opinion, governed by section 15 of the act of August 18, 1856, which entitles them, as compensation for their services, to such fees as they may collect in pursuance of the provisions of that act, or so much thereof as shall be determined by the President. (11 Stats., 57.) Consular agents are not consuls or commercial agents within the meaning of the laws regulating the consular system of the United States.

They are defined by section 31 of the act of 1856 as consular officers, subordinate to consuls and commercial agents, exercising the powers and performing the duties within the limits of their consulates or commercial agencies respectively at ports or places different from those at which such principals are located. Whenever Congress has intended to include them within any provision of law, it seems to have mentioned them specifically, or employed the general expression "consular officers," which describes subordinate as well as principal officers in the consular service.

Under the 15th section of the act of 1856, the fees of consular agents, or so much thereof as they are allowed to retain by regulation of the President, appear to accrue to them in their own right, and not in that of the principal officers of the consulates. This provision is not changed or modified in any particular by the law of 1866. The fees they may be entitled to retain under the act of 1856 are not, therefore, to be considered as forming any part of those collected and returned by their principal consular officers.

The 15th section of the act of 1856 provides also that "the principal officer of the consulate or commercial agency within which such consular agent shall be appointed shall be entitled to the *residue*, if any, in addition to any other compensation allowed him by this act for his services therein." I understand by this, that if a consular agent is

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not allowed, by the regulation of the President, to retain all the fees he may collect, the *residue*, being the difference between all the fees so collected and the amount which the agent is authorized to retain, is payable to his principal. Now, question may be made whether the amount of fees thus received by such principal, if an unsalaried consul or commercial agent, is returnable in the principal's account to the Secretary of the Treasury, and constitutes part of the fund out of which the maximum of $2,500 is allowed under the act of 1866? I am of opinion that this question must be answered in the affirmative. I think that each unsalaried consul must return, under the act of 1866, all the fees collected by himself, or by any one on his behalf, and also the amount of fees which he may receive through his consular agents.

But I do not think that any part of the fees which the agents are authorized to retain, by regulation under the act of 1856, is returnable in the accounts of their principals.

It will be perceived that no limitation of amount is imposed by the act of 1856 upon the fees retainable by consular agents. The limitation of $2,500 is applicable only to the compensation of the principal consular officers who are mentioned in the 3d section of the statute.

The second question on which my opinion is asked is, Whether the section referred to is to be considered as limited to unsalaried principal consular officers?

There can be no doubt that it is so limited.

The consuls and commercial agents not mentioned in schedule B or C are those who receive no salaries, but are compensated by fees, and the restricting clause applies exclusively also to that class of consuls and commercial agents. Consular agents subordinate to salaried consuls are not affected by the 3d section of the act of 1866 any more than those attached to unsalaried consulates. Both classes of consular agents are still governed, in respect to their compensation, by the provisions of the general law of 1856.

I am of opinion, therefore, as follows:

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1st. That the 3d section of the act of June 15, 1866, is limited to unsalaried consuls and commercial agents.

2d. That consular agents, whether subordinate to salaried or unsalaried consuls, are entitled to the compensation previously allowed them under the 15th section of the act of August 18, 1856.

3d. That the fees which consular agents, subordinate to unsalaried consuls, may be allowed to retain for their own compensation, under the act of 1856, are not returnable in the accounts of the consuls under the act of 1866; and,

4th. That the amounts of fees collected by such consular agents, which are payable to, and received by their principals, under the act of 1856, and regulations pursuant thereto, are returnable in the accounts of the principals.

I am, sir, very respectfully,

Your obedient servant

HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

PUBLICATION OF THE LAWS.

1. The publication of the laws and resolutions of Congress is not provided for in the 6th section of the act of May 18, 1866.
2. There is no regulation of law for the publication of laws, treaties, and resolutions in the city of Washington, but such publication may be made at any place within the limits of the District of Columbia.

ATTORNEY GENERAL'S OFFICE,
December 13, 1866.

SIR: I have had under consideration the questions submitted in your letter of the 6th instant:

1. "Whether the publication of the laws of Congress in newspapers is provided for by the 6th section of the act of May 18, 1862?

2. "Whether there is any existing regulation of law for the publication of laws, treaties, and resolutions in the city

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of Washington, supposing two newspapers are found outside of Washington in the District of Columbia, and, if so, does the qualification, '*required by law to be published in the city of Washington*,' found in the act of 1866, relate as well to the '*advertisements and notices*' therein mentioned as to '*proposals for contracts*,' and, as before queried, do any of these terms include the publication of laws, treaties, and resolutions of Congress?"

The 1st section of the "act to provide for the publication of the laws of the United States, and for other purposes," passed April 20, 1818, provides, "That at and during the session of each Congress of the United States the Secretary of the Department of State shall cause the acts and resolutions passed by Congress at such session to be published, currently as they are enacted, and as soon as practicable, in not more than one newspaper in the District of Columbia, and in not more than three newspapers in each of the several States, and in not more than three newspapers in each of the territories of the United States; and he shall also cause to be published, in like manner, in the said newspapers, or in such of them as he shall for that purpose designate, the public treaties entered into and ratified by the United States."

The 1st section of the act of May 11, 1820, entitled "An act to amend the act entitled 'An act to provide for the publication of the laws of the United States, and for other purposes,'" provides, "That the Secretary of State shall, as soon as conveniently may be, after he shall receive any order, resolution, or law passed by Congress, except such orders, resolutions, and laws as are of a private nature, cause the same to be published in a number of public newspapers, not exceeding one in the District of Columbia, and in not more than three newspapers in each of the several States and Territories of the United States; and he shall also cause to be published, in like manner, in the said newspapers, all public treaties entered into and ratified by the United States, except Indian treaties, which shall be published only in one newspaper, and that to be

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within the limits of the State or Territory to which the subject-matter of such treaty shall belong."

Then follows, in the 2d section of this act, a repeal of the 1st section of the act of April 20, 1818, above recited.

In the appropriation act of August 26, 1842, section 21, it is provided, "That the act entitled 'An act to provide for the publication of the laws of the United States, and for other purposes,' approved April 20, 1818, so far as the same authorizes or requires the laws, resolutions, treaties, and amendments of the Constitution of the United States to be published in any paper or papers printed in the different States or Territories of the United States, is hereby repealed, and in lieu thereof, it shall be the duty of the Secretary of State to publish such laws, resolutions, treaties, and amendments in not less than two nor more than four of the principal newspapers published in the city of Washington for country subscribers, giving preference to such papers as have the greatest number of permanent subscribers and the most extensive circulation."

This last recited section was repealed on the 8th of August, 1846, by "An act to provide for the more effectual publication of the laws of the United States," which further provides, "That so much of the act entitled 'An act to provide for the publication of the laws of the United States, and for other purposes,' approved April 20, 1818, as is repealed by the said 21st section, be, and the same is hereby, revived and continued in force: *Provided*, That the Secretary of the Department of State shall cause the publication of such laws, resolutions, treaties, and amendments in two of the newspapers in the District of Columbia, and in each of the several States and Territories of the United States, and no more."

In the "act making appropriations for the service of the Post Office Department during the year ending the 30th of June, 1866," &c., passed May 18, 1866, section 6, it is provided, "that all advertising, notices, and proposals for contracts for the Post Office Department, and all advertising, notices, and proposals for contracts for all the executive

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departments of the Government, required by law to be published in the city of Washington, shall hereafter be advertised by publication in the two daily newspapers in the city of Washington having the largest circulation, and in no others: *Provided*, That the charges for such publications shall not be higher than such as are paid by individuals for advertising in such papers."

Upon a careful review of these statutory provisions, I am of opinion, in answer to your first question, that the publication of the laws and resolutions passed by Congress is not provided for in the 6th section of the act of May 18, 1866.

On the second question, I have to say, that I find no regulation of law for the publication of laws, treaties, and resolutions in the city of Washington exclusively. The publication may as well be had in two newspapers published outside of the city limits in the District of Columbia, the limitation as to the place of publication being the limits of the District and not of the city.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

CASE OF CALIFORNIA STEAM NAVIGATION COMPANY.

The judgments against the employees of this company may be released by remissions of the Secretary of the Treasury under the act of 1797.

ATTORNEY GENERAL'S OFFICE,
December 31, 1866.

SIR: I have the honor to return herewith the papers accompanying your letter of the 17th instant relative to the suits and judgments obtained in the Oregon district court against certain employees of the California Steam Navigation Company, and to say that I am not aware that

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it is in the power of the executive department of the Government to affect the judgments of the district court through or by means of a discontinuance of the suits in question. Even if the appeals or writs of error of the defendants to the circuit court should be dismissed on their own motion, the judgments of the district court would still remain; and I do not think that a discontinuance of the actions would operate to destroy or impair the efficiency of the judgments of the court in those suits. If the cases had not proceeded to judgment, they would now be under the control of the executive department of the Government.

I may suggest, however, that the cases can perhaps be reached by remissions under the act of 1797, granted by the Secretary of the Treasury. If you should grant remissions of the penalties in these cases, it would be for the defendants' counsel to advise how they shall be introduced and made available in the litigation.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

PROPERTY OF GENERAL TWIGGS.

Where a libel in confiscation against real property has been dismissed and the property has been ordered by the court to be restored to the administrator of the former owner, the fact that such administrator is the guardian of the heir of the estate, and is an unpardoned rebel, should not restrain the Executive from surrendering the property to him.

ATTORNEY GENERAL'S OFFICE,

January 5, 1867.

SIR: I have had under consideration the papers referred to me, in the matter of the application in behalf of John Twiggs, a minor son of the late General Twiggs, for the

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Property of General Twiggs.

restoration of two dwelling-houses on Prytance street, New Orleans, now in possession of the Freedmen's Bureau.

This property was seized under a military order of General Butler, in June, 1862, as the property of General Twiggs, an officer in the confederate service.

General Twiggs died in July, 1862. After his death, proceedings in confiscation were commenced by the district attorney, on the 5th of December, 1863, against this property, under the act of December 5, 1861.

This appears by the letter of Mr. Goodloe, district attorney, to my predecessor, dated March 21, 1866, in which it is stated that General Twiggs died July 15, 1862. The ground laid in the libel was, that this property had been used as the headquarters of General Twiggs whilst in command of the rebel forces; but the proof was that he only occupied it as his dwelling-house.

The district attorney further stated, that he could not make out a case for condemnation, and asked authority to dismiss the proceeding.

On the 29th of March, 1866, such authority was given by Mr. Speed, Attorney General, by letter of that date, and, at the April term of the circuit court of the United States for the eastern district of Louisiana, on motion of the district attorney, the libel was dismissed, and the property was ordered to be restored to the administrator of Twiggs' estate.

I see no ground upon which the possession of this property can be lawfully retained by the United States. It seems to be conceded, in the various reports of military officers found among the papers and sent here from the War Department, that the United States have no title or interest in the property; but an objection is raised against the delivery of the possession to Twiggs' administrator, A. C. Myers, on the ground that he is an unpardoned rebel. It appears that Myers is also guardian and curator of the minor, John Twiggs.

I think the objection not well taken. The personal disability of the guardian, if there is such disability, cannot

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affect his ward; and, after the court has ordered restoration of the property to the administrator, it is too late to make such an objection.

I am accordingly of opinion, that an order should be made that possession of this property be surrendered to the administrator or his authorized agent.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

The PRESIDENT.

NATIONAL ASYLUM FOR DISABLED VOLUNTEERS.

The requisition of the Secretary of War on the Secretary of the Treasury for the fund appropriated by Congress to the "national asylum for disabled volunteer soldiers" should be in favor of the president of the institution.

ATTORNEY GENERAL'S OFFICE,

January 16, 1867.

SIR: I have considered the question submitted for my opinion by your letter of the 31st ultimo, Whether your requisition on the Secretary of the Treasury for $220,000 of the fund appropriated by Congress to the "national asylum for disabled volunteer soldiers" should be in favor of the president thereof, (General Butler,) or in favor of the "treasurer?"

I remark, in the first place, that there is no such officer as a treasurer of this corporation. There are treasurers provided for in the charter for the respective asylums to be established, in common with other officers of each asylum, as governor, deputy governor, &c., to whom are added other officers by the by-laws. But neither the act of Congress nor the by-laws provide any such officer as a treasurer of the corporate institute at large.

This institution was created by act of Congress of March 3, 1865, (13 Stats., 509,) in which there is contained nothing to the present point.

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By act of the 21st of March last the former act was superseded in the main.

The corporators are identical with the managers. These include the President of the United States, the Secretary of War, and the Chief Justice, *ex officio*, and nine other persons, to hold for certain terms, to be appointed from time to time by joint resolution of Congress. By resolution of the 21st of April last, Congress appointed these nine, among whom, as a corporator and manager, is General Butler.

The powers of this board, being corporators as well as managers, are, among others usually given, "to make by-laws, rules, and regulations for carrying on the business and government of the asylum, and affix penalties thereto;" "to procure for early use * * sites for military asylums;" "to have the necessary buildings erected;" "to receive all donations of money or property made by any person;" to appoint and remove officers specified, and others which they may deem necessary for the several asylums, and other powers.

The act provides further, "That the business of said asylum shall be managed by a board of twelve managers, who shall select from their own number a president, who shall be the chief executive officer of the board, two vice presidents, and a secretary; and seven of the board, of whom the president or one of the vice presidents shall be one, shall form a quorum for the transaction of business at any meeting of the board."

In the act of incorporation I find nothing more of a directory character.

By-Laws.—Art. 3. "The president, vice presidents, and secretary of *the board*, and *treasurers* of the *military* asylums" are spoken of.

Art. 8. Duties of the president of the board: He "shall, when present, preside at all meetings of the board; he shall sign all deeds of the establishment and affix the common seal, when directed or sanctioned by the board; approve all contracts; make and sign all requisitions upon

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any department of the Government for all dues and claims of the national asylum, when so ordered by the board of managers. Such requisitions shall be countersigned by the secretary of the board, under the seal, and shall contain a copy of the vote by which they are ordered. The president shall direct all investments, and designate all depositaries of the moneys of the national asylum, subject to the supervision of the board, and may superintend and direct all expenditures by other officers of the establishment, and shall transfer all moneys necessary to the several treasurers of military asylums by his order, countersigned by the secretary of the board." (General care and supervision, &c., added to his duties.)

ART. 15. The treasurer of each asylum is required to give bonds of $50,000. (No other officer is required to give bond.)

ART. 19. "All moneys not appropriated to immediate use shall be invested in United States securities, payable to the national asylum, transferable only upon the vote of the board, by the president, countersigned by the secretary of the board."

I have hereinbefore called your attention to the fact, that no such officer as a treasurer of this corporation is provided for either in the act of Congress or in the by-laws of the corporation; so that the alternative stated in the question as submitted, whether your requisition should issue in favor of the treasurer, must necessarily be answered in the negative.

Considering that this corporation is to receive and hold money before it is transferred to the hands of the treasurers of the local asylums, it is a little singular that no such officer as a treasurer for the corporation at large has been appointed as the custodian of the money before it is transferred, paid out, or distributed to the local treasurers.

The entire management of the corporate business being vested in the corporate managers, it comes within the scope of their duties and powers to regulate the business

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of receiving and disbursing the moneys of the corporation.

The act makes the president the chief executive officer, and the 8th by-law gives him express power to make and sign all requisitions upon any department of the Government for all dues and claims of the corporation, when so ordered by the board of managers.

Such requisitions are to be countersigned by the secretary of the board, under the corporate seal, and must contain a copy of the vote by which they are so ordered.

The requisition said to have been made by General Butler, as president, is not before me; but if it requires the money to be paid to him as president, and is countersigned by the secretary of the corporation under its seal, and contains a copy of the vote by which it was ordered, I am of opinion that your official requisition should be in his favor.

The delegation of his authority by a vote of the managers is just as efficacious as if made by a formal letter of attorney under the corporate seal.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

CASE OF A. B. MOREY.

The right of removal, given by the 3d and 4th sections of the act of May 11, 1866, attaches upon the filing of the petition, verified by affidavit, according to the 5th section of the act of March 3, 1863, without giving security for filing copies of the papers in the circuit court, and without giving security for the appearance of the defendant in that court.

ATTORNEY GENERAL'S OFFICE,
January 17, 1867.

SIR: I have the honor to state my opinion in the matter of A. B. Morey, upon the question submitted by your let-

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ter of January 7th, as to the course proper to be pursued in his behalf. I take the facts from the statement made to you by General Grant, under the same date.

From this statement it appears that Morey was a private in the 124th Illinois infantry volunteers, and was detailed for detective duty in November, 1862, by order of General Grant, and remained on such duty until July, 1865.

During that time, and in accordance with the instructions of General Grant in such cases, he took from a citizen two tents, believed to be the property of the United States, and turned them over to the provost marshal. He now stands indicted and is under bail in the sum of $3,000 to appear for trial before the civil courts at Vicksburg, Mississippi, for stealing these tents.

These facts bring private Morey within the protection provided in the 4th and 5th sections of the habeas corpus act of March 3, 1863, and the act amendatory thereto of May 11, 1866.

It is provided by the 4th section of the first-named act and the 1st section of the last-mentioned act, among other things, that as to any seizure, or any act done during the rebellion, it shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any such seizure or act, that the same was made or done under the order of the President, or in virtue of an order, written or verbal, general or special, made by the Secretary of War, or by any military officer of the United States holding the command of the department, district, or place within which such seizure or act was done or committed.

These provisions allow the defense to be made in the civil or criminal courts of a State, but an election is given to the defendant to remove the suit or prosecution into the circuit court of the United States for the district where the suit is pending, and this right of removal may be exercised at the first appearance of the defendant to the suit or prosecution in the State court, or at any stage of the case before the jury is empanneled, but if then omitted, either party

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may remove the case, after final judgment, by appeal, into the circuit court, as aforesaid.

If, as in the case of Morey, bail has been required of the defendant in the State court, he is, by the 5th section of the act of 1863, to give good and sufficient security for entering bail in the circuit court.

It is further provided, by the 4th section of the act of 1866, that if the State court shall, notwithstanding the performance of all things required for the removal of the case to the circuit court aforesaid, proceed further in the cause or prosecution, then all further proceedings in the State court shall be void and of none effect.

I am of opinion that the right of removal given by the 3d and 4th sections of the act of 1866 attaches upon the filing of the petition, verified by affidavit, according to the 5th section of the act of 1863, without giving the security for filing copies of the papers in the circuit court of the United States, and (where bail has been given in the State court) without giving security for the appearance of the defendant in the circuit court and entering bail in that court.

The surety for filing the papers is expressly waived. By the 3d section of the act of 1866 it is provided, that "on the filing of the petition, verified as provided in the said 5th section," (of the act of 1863,) "the further proceedings in the State court shall cease, and not be resumed until a certificate, under the seal of the circuit court of the United States, stating that the petitioner has failed to file copies in said circuit court, at the next term, is produced."

These statutory provisions afford complete relief in the case stated. Under instructions issued heretofore from your department, a great number of similar suits and prosecutions, brought in the State courts of Kentucky against loyal persons and officers in that State for similar acts and seizures, have been, before and after judgments in the State courts, removed to the proper circuit court of the United States in Kentucky, and have in every instance hitherto availed as a complete defence.

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The papers accompanying your letter contain copies of the orders under which Morey acted, and are sufficient for his defence in the State court, or to authorize the removal of the case into the circuit court, and for his defence in that court.

I would, therefore, advise that instructions be sent to the officer in command at Vicksburg to furnish, for the use of Morey, the documents or orders under which he acted, and to see that his case is properly defended.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

SCHNEIDER'S CASE.

The Secretary of the Navy may waive a forfeiture stipulated in a contract with his department, in a case of good faith, where the forfeiture occurred through misfortune.

ATTORNEY GENERAL'S OFFICE,
February 5, 1867.

SIR: I have considered the opinion of the Solicitor of the Treasury in the case of J. & N. Schneider, enclosed in your letter of the 28th of December last, and agree with the Solicitor that you have authority, under the circumstances of that case, to waive the forfeiture stipulated in the contract of the parties with the department.

I understand the case to be clearly one of *damnum absque injuria*, and of entire good faith on the part of the contractors, whose delay in the execution of the work was occasioned by misfortune.

I think with Mr. Attorney General Taney, that the officers of the Government are not bound, from the nature of

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our institutions, to perpetrate an act of injustice in the name of the United States. (2 Opinions, 485.)

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. GIDEON WELLES,
Secretary of the Navy.

THE STEAMSHIP R. R. CUYLER.

Upon the facts of this case, it appears that this vessel was prematurely and without probable cause libelled for violation of the neutrality laws, and she should be released on the owners giving the bond required by the 9th section of the act of April 20, 1818.

ATTORNEY GENERAL'S OFFICE,
February 11, 1867.

SIR: It appears that the steamship R. R. Cuyler, being the property of Messrs. Sturgis, Taylor, Hubbell & Dollard, of New York, was sold by them to one Vernon H. Brown, as agent for the republic of Colombia.

The contract of sale is not before me, but some of its terms are stated; among others, that the vendors were to fit out the vessel as a national vessel of Colombia, and were to deliver her at an Atlantic port of Colombia, and upon such delivery were to receive the purchase-money. Whilst she was being fitted out at the port of New York, Brown, as agent, as aforesaid, purchased and placed on board an armament, ammunition, and supplies suitable for a vessel-of-war. On the 2d day of the current month, the vessel being ready for sea, Mr. Sturgis presented a manifest of all the articles on board (as he deposes) at the custom-house, and was granted a clearance. The vessel was then seized by the custom officers, on the charge that she was about to proceed on an unlawful voyage; and on the 5th instant, at the request of the collector of the port, the vessel was libelled by the district attorney under the

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3d section of the neutrality act of April 20, 1818, who upon the same day reported his proceedings to the Secretary of State.

On the 6th instant, General Salgar, the Colombian minister, addressed an official letter to the Secretary of State, affirming the purchase of the vessel by his government, through the agency of Mr. Brown, her fitting out by the vendors as a vessel-of-war, and the purchase of her armament and stores by that government, and that by the terms of the contract the vendors were bound to deliver the vessel at the port of Aspinwall, one of the Colombian ports.

General Salgar adds, that the vessel was purchased in good faith by himself for his government, and he claims that the purchase and the voyage are lawful, and requests that the vessel be released and be allowed to proceed with her cargo to the port of destination.

There are among the papers affidavits, statements made by persons on board, and documents found in their possession, which create a suspicion that there was a purpose of changing the destination of the vessel after she should have gone to sea, and to convert her to a Chilian privateer, to be used against Spanish vessels.

The 3d section of the neutrality act of April 20, 1818, provides, that if any person shall, within the limits of the United States, fit out and arm any vessel, with intent that such vessel shall be employed in the service of any foreign State, to cruise against the citizens or property of a foreign State with which the United States is at peace, he shall be fined not more than $10,000 and imprisoned not more than three years, and such vessel, with all her equipments, armament, and stores, shall be forfeited, one-half to the use of the informer and one-half to the use of the United States.

The 9th section of the act requires the owners or consignees of every armed vessel sailing out of the ports of the United States, belonging in whole or in part to citizens of the United States, to enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in

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double the value of the vessel and cargo, including her armament, conditioned that she shall not be employed by such owners to cruise against the citizens or property of any foreign State with which the United States is at peace.

The 11th section authorizes and requires the collector to detain any vessel, manifestly built for warlike purposes and about to depart the United States, of which the cargo shall consist principally of arms and munitions of war, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed by the owner to cruise or commit hostilities upon the citizens or property of any foreign State with which the United States are at peace, until the decision of the President be had thereon, or until the owner shall give such bond and security as is required of the owners of armed ships by section 9th of the act.

I do not find that there is any proof in the case which implicates the owners of this vessel in any intent to employ her in any unlawful enterprise. Whether we consider the ownership of this vessel yet vested in Messrs. Sturgis & Co., the vendors, or in the Colombian government, the affidavit of the former, and the official assurance of the latter, made through General Salgar, I deem sufficient on that point.

The suspicious circumstances in this case arise upon the statements of some of her officers and crew and papers found in their possession on board, but there is nothing to connect the owners with any unlawful purpose.

It is clear that the libel was prematurely filed, for the statute expressly directs only a detention of the vessel until the decision of the President is made.

The question arises as to what order should now be made.

I have felt inclined to advise that an order for the dismissal of the libel and the delivery of the vessel would be justifiable, and if the Colombian government were now the owner of the vessel, and had assumed the responsibility of her voyage to Aspinwall, I would not hesitate to advise that course without any conditions.

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But, as I understand the terms of the contract, Messrs. Sturgis & Co. continue to be the owners, and the vessel is under their control until her delivery at Aspinwall. In that view of the condition of things, it seems to me proper that they should enter into the bond required by the 9th section of the act, and, upon doing so, that the libel be dismissed and the vessel delivered to them to proceed on her voyage.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

The PRESIDENT.

CASTILLERO'S CLAIM

1. The act of July 1, 1864, does not apply to surveys which had become final by lapse of time or approval of the district court before that act went into operation.
2. A patent should be issued upon a survey which became final and conclusive before the passage of the act of July 1, 1864.

ATTORNEY GENERAL'S OFFICE,
February 15, 1867.

SIR: I am in receipt of your letter of the 29th ultimo, relative to the claim of Andres Castillero for a patent for the island of Santa Cruz, California.

By the act of June 14, 1860, the surveyor general of California is required, when he shall have caused a private land claim to be surveyed and a plat thereof to be made, to give notice that the same has been done and of the approval of the survey and plat, by a publication, once a week for four weeks, in two newspapers published as mentioned in the 1st section of the statute. (12 Stats., 33.)

If objections to the survey and location shall be made on the part of the United States, the district court is authorized, on the motion of the attorney of the United States, to make an order requiring the survey to be returned and transmitted by the surveyor general to the district court

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for examination and adjudication. The 5th section of the act provides that when, after the publication provided for in the 1st section, no application shall be made to the district court for an order requiring the survey to be returned into that court for examination and adjudication, it shall be the duty of the surveyor general to transmit, without delay, the plat or survey of the claim to the General Land Office, and the patent for the land as surveyed shall forthwith be issued.

It appears by the certificate of the surveyor general in this case that he caused to be made, in April, 1862, and March, 1863, a survey and plat of the tract of land confirmed to Andres Castillero by decree of the district court.

The surveyor general further certifies, that by virtue of the provisions of the act of 1860, he caused the approval of said survey to be published in accordance therewith; but it is not stated *when* the publication was made and completed, whether before or after the passage of the act of July 1, 1864, which repealed the statute of June 14, 1860. (13 Stats., 332.) I perceive that the clerk of the district court certified that on November 10, 1864, the full period of six months from and after the publication of the approval of the survey had elapsed. The publication must have been completed, therefore, in the month of May, 1864.

If this certificate is to be regarded as the proper evidence of the fact that the publication directed by the 1st section of the act of 1860 had been made prior to the 1st day of July, 1864, there can be no doubt that before the passage of the statute of 1864 the present survey was a finality. Now, the act of July 1, 1864, does not apply to surveys which had become final by lapse of time or by approval of the district court before the act went into effect.

If, then, it be true that the publication of the approval of this survey was made and completed under the 1st section of the act of 1860, and no objections thereto were filed in the district court, and no order was applied for directing the return of the survey into court for examina-

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tion before the date of the act of 1864, the survey was final and conclusive at that date, and a patent for the land as surveyed should forthwith be issued.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. O. H. Browning,

Secretary of the Interior.

THE STEAMSHIP R. R. CUYLER.

Upon the representations of the Spanish minister in reference to this vessel, the Attorney General finds it unnecessary to advise any action in addition to that heretofore taken in regard to her pursuant to his previous opinion on the subject.

Attorney General's Office,

Februarg 28, 1867.

Sir: I have the honor to acknowledge the receipt of your letters of the 22d and 26th, enclosing letters to you from Mr. Tassara, the minister of Her Catholic Majesty, dated respectively the 20th and 25th instant, on the subject of the Cuyler. You request an expression of my opinion upon the observations submitted in Mr. Tassara's communications.

I have given these communications the most respectful and careful consideration, but do not see upon what ground, as the law officer of the United States, I can take or advise any action in addition to that heretofore taken in reference to this vessel.

According to my judgment the course of action which has been taken is in strict accordance with our neutrality laws.

I am happy to see that Mr. Tassara acquits the Colombian government of all participation in any unlawful purpose in reference to the purchase and destination of this vessel.

The suspicious circumstances to which he refers do not

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inculpate that government or the American merchants who have sold and are bound to deliver this vessel at one of the Colombian ports to the possession of the Colombian government.

Mr. Tassara refers altogether to suspicious circumstances attaching to some of her crew, which have led, as he states, to complications between the crew and the owner, causing delay in her departure.

It is upon the footing of such suspicious circumstances that the bond was required of the owners. As to the sufficiency of the bond in amount, which Mr. Tassara says is supposed not to amount to double the value, or even to the actual value, of the vessel, I have only to say, that the value of the vessel was fixed by the proper officers of the United States, who must be intended to have understood and to have faithfully performed the duty of appraisement.

The United States has done what was proper in reference to this vessel, her present owners and the Colombian government both acting in good faith, to provide the proper safeguard against the illegal designs of others towards Her Catholic Majesty's subjects and their commerce.

Whatever ulterior designs may be suggested as to the course to be pursued by the Colombian government after the vessel shall come into its possession, the United States can only entertain the same conviction as that expressed by Mr. Tassara, of the entire good faith of that government. If, after the delivery of the vessel, and after she becomes a vessel-of-war of the Colombian government, she depredates on Spanish commerce, it is the Colombian government, not the United States, which can be held responsible for such a breach of neutrality.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. Wm. H. Seward,

Secretary of State.

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THE MOLENE WATER-POWER COMPANY.

The Secretary of War is advised not to enter into a proposed agreement with the Molene Water-Power Company at Rock Island without authority of Congress.

ATTORNEY GENERAL'S OFFICE,
March 1, 1867.

SIR: I have the honor to say, in reply to your letter of the 1st ultimo, relative to the arrangement which it is proposed you shall enter into with the Molene Water-Power Company at Rock Island, that I am of opinion there is nothing in the legislation to which my attention is called that empowers you to execute the agreement approved by the commissioners appointed under the act of April 19, 1864.

The proposed arrangement may be very expedient and practicable, but I should not advise you to enter into it without additional authority from Congress.

The papers transmitted with your letter are herewith returned.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

PRESTON'S PAROL.

The cessation of war and the peace proclamation of the President relieve a rebel officer from his parol and from military jurisdiction.

ATTORNEY GENERAL'S OFFICE,
March 2, 1867.

SIR: I have had under consideration the question propounded in yours of the 29th January last, to wit, Whether Mr. Preston, formerly an officer in the confederate rebel

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service, and who, after his surrender, was discharged upon parol, is now to be considered a prisoner of war, subject to his parol and under military jurisdiction.

I have the honor to advise that the cessation of war, followed by the proclamation of peace, relieves Mr. Preston from the parol and from military jurisdiction.

The letter of Mr. Preston is herewith returned. I also return herewith the application for a parol now to be issued to Mr. Hindman, late an officer in the rebel service, now abroad, as to which I need only say that no such parole can be granted.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

THE SAN FRANCISQUITO RANCH.

A patent may be issued for land which has been surveyed and the survey of which has been acted upon by the district court, before the time limited by the act of July 23, 1866, for appeal to the circuit court, if all the parties of record in the case in the district court expressly waive, by agreement of record, their right of appeal.

ATTORNEY GENERAL'S OFFICE,
February 25, 1867.

SIR: I am in receipt of your letter of the 10th instant, enclosing a communication from the Commissioner of the General Land Office, relative to the rancho "San Francisquito," in California.

It appears that the title of M. C. V. de Rodriguez to this ranch was finally confirmed on April 2, 1857, and that the survey thereof was approved by the district court on August 20, 1866.

By the 9th section of the act of July 23, 1866, it is provided, that from any decree of the district court for

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California, approving the survey of a private land claim under a Spanish or Mexican grant, rendered after July 1, 1865, an appeal shall be allowed to the circuit court for the period of one year after the entry of such decree. (14 Stats., 221.)

Any party, therefore, entitled to appeal from the survey of the claim in question may exercise that right at any time before the 20th of August next.

The Commissioner states that the United States have no interest in the tract in question, as it is entirely surrounded by private claims. He further states, that the parties interested have waived the right of appeal in the presence of the district attorney, who interposed no objection.

The first question submitted is, Whether such waiver is sufficient to warrant the issue of a patent for the tract mentioned without waiting for the statutory limitation to expire?

I presume the parties interested in the survey may belong to one or other of two classes, or to both classes of persons: proprietors of the contiguous lands and parties claiming interests in the land in question under pre-emption settlement, or other right or title derived from the United States.

The act of June 14, 1860, under which the district court acquired jurisdiction of this survey, recognized the right of pre-emption settlers, and others claiming under the United States, to contest the survey of a confirmed claim by the surveyor general of California. (12 Stats., 34.) Neither the act of July 1, 1864, nor that of July 23, 1866, declares who are competent to appear and contest in the circuit court on appeal such a survey, approved by the district court.

In the case of The United States *vs.* Estudillo, (1 Wall., 710,) the decision of the Supreme Court appears to have proceeded on the doctrine, that an appeal duly taken to the Supreme Court from a decree of the district court, approving a survey of a private land claim, was not dis-

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missable by the Attorney General without the consent of parties claiming under the United States who appeared of record as having an interest in the survey and participated in the proceedings thereon in the district court.

The doctrine of this case would seem to require, in the matter of the present survey, that an express waiver of record of an appeal, in their own names and rights, should be obtained from all parties, those claiming through or under the United States as well as those not so claiming, who were recognized by the district court as having an interest in contesting the survey, and who participated in the proceedings thereon in that court. I have no doubt that if all such parties have thus waived an appeal, with the consent of the attorney of the United States, a patent for the land in question may lawfully be issued to the confirmee before the expiration of the year from the date of the decree of the district court.

It is always inconvenient, and sometimes dangerous, for this office to give an opinion on general and abstract questions of law before they arise upon cases actually pending in an executive department for decision and action. I would much prefer, therefore, not to commit this office to any general answer to the second question stated in your letter.

If, however, you should deem it important to obtain my views on that question, I will be happy, on a further request, to state such considerations as may occur to me to be pertinent to the subject.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. O. H. BROWNING,

Secretary of the Interior.

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CITIZENSHIP OF CONSULAR OFFICERS.

The act of February 28, 1867, forbidding the payment of compensation to any consul or commercial agent of the United States who is not a citizen of the United States, does not apply to deputy consuls, consular agents, vice consuls, and vice commercial agents.

ATTORNEY GENERAL'S OFFICE,
March 6, 1867.

SIR: I have the honor to say, in reply to the inquiry made in your letter of the 28th ultimo, that I am of opinion that the words "consul or commercial agent," in the provision of the act of February 28, 1867, which forbids the payment of compensation to any "consul or commercial agent who is not a citizen of the United States, native or naturalized," are not to be construed as including subordinate or substituted consular officers, such as "deputy consuls," "consular agents," "vice consuls," and "vice commercial agents." It would have been very easy for Congress to have declared its intention to embrace such consular officers within the prohibition of the act if it had meant to include them, and the omission to do so must be taken as strong evidence of an intention to exclude them.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

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MEMPHIS NAVY-YARD PROPERTY.

1. A general review of the situation of this property with reference to the provisions of the confiscation acts.
2. Property in a rebel city, occupied by the military authorities for the accommodation of our troops in garrisoning the city, cannot be brought as captured property within the operation of the captured and abandoned property acts.

ATTORNEY GENERAL'S OFFICE,
March 6, 1867.

SIR: I have considered the report of the Quartermaster General and the accompanying papers, relative to the "Memphis navy-yard property," transmitted to me from your department some time since, and now beg leave to state, very briefly, the views I entertain at present as to the disposition which should be made of that property.

It appears that by section 3 of the act of August 5, 1854, all the grounds and appurtenances known as the Memphis navy-yard were ceded by the United States to the mayor and aldermen of the city of Memphis, for the use and benefit of the city. In 1857 the city contracted a debt of $350,000, and issued bonds therefor, to secure which a mortgage was executed upon this entire property.

The bonds were sold in the market and purchased by numerous holders, some of them being in Europe and others in the northern States. The city also divided the property into lots, which were leased to individuals, at a stipulated rent, for terms of thirty years; the rent money being dedicated to the payment of the accruing interest of the bonds.

It appears that during the occupation of the city by the rebel forces some of the buildings were used by an individual, whose name is given, as a place for the manufacture of materials and missiles of war. But it does not appear that the people or authorities of the city had any participation in this employment of a part of the premises. The manufacture of these arms and munitions of war may

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have been conducted, for aught that appears from the evidence before me, by one of the lessees, on his private account, without the consent or knowledge of the municipal authorities. The character, extent, and circumstances, however, of the hostile use of the property, or any portion of it, during the war, may be easily ascertained, (if they have not been already,) by proper investigation of the facts of the case.

In 1862 Memphis was occupied by our forces, and the buildings and premises in question were taken into the possession and use of the United States military authorities, who have occupied and controlled them for military purposes ever since. The lessees of the premises, being out of possession, have refused to pay rent; and thus, the interest on the bonds being unpaid, the holders have obtained a decree in chancery against the city, under which a receiver has been appointed to take charge of the property for the benefit of the bond-holders.

Such are the principal facts disclosed by the papers transmitted to me from your department. Since the receipt of those papers, I have received a letter from the district attorney, stating that the quartermaster in charge of the property has been notified that the city intends to institute an action of ejectment against him to recover possession of the land.

It is not necessary to inquire whether property of this character and such ownership is embraced by the provisions of the captured and abandoned property acts, and should be disposed of according to those provisions, as suggested by the Quartermaster General, because I am of opinion that there was in this case no such "capture" of the property in question as the acts referred to contemplate in the case of property brought within their scope and operation.

In so far as the evidence contained in the papers submitted to me throws light upon the original taking, it shows that the purpose and object of the military in assuming the possession of them were to employ the

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premises—the buildings and grounds—for the use and accommodation of our troops in garrisoning the city. They have been thus employed ever since, and the Quartermaster General recommends that as long as it may be necessary to retain a garrison in Memphis the property ought to be retained for its accommodation.

I do not perceive in this case, under the evidence reported, any of the legal elements that constitute a case of capture *jure belli*. The seizure seems to have been made for the purpose of applying the property to those necessary public uses to which it is recommended it should be dedicated as long as United States troops are retained in Memphis.

The first question asked in your letter, namely, whether the property should be considered as *captured*, must be, therefore, answered in the negative.

The property may be either restored to the claimants under executive authority, or proceeded against for confiscation under the act of August 6, 1861, "to confiscate property used for insurrectionery purposes." I am not prepared at present to say what course should be pursued with regard to it. A great many delicate considerations may arise regarding the relation toward the property of the bond-holders who had during the war, and have now, a vested beneficial interest in it, and many of whom were probably not in any way concerned in the rebellion.

Even if the title of the city to the land, which consisted of a bare equity of redemption, would pass under a judicial sale upon a decree of confiscation, it is very doubtful whether the rights and interests of the mortgagees and bond-holders could be impaired or affected by the result of a judicial proceeding founded upon the hostile employment of the property during the war.

Before finally advising you whether the present possession should be longer maintained, to await the institution of proceedings under the act of 1861, I will obtain such information as the district attorney may have in regard to the hostile use of the property which has been mentioned.

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The documents accompanying your letter are herewith returned.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

DEVLIN'S CLAIM.

1. A military commission sitting in Washington during the war had no jurisdiction to try a citizen of the United States, not in the military service, for a criminal offence committed in New York.
2. Any moneys or effects taken by an officer or agent of the United States, from a citizen so tried and convicted, in execution of the sentence of such a commission, imposing a fine upon the prisoner, may be restored to him, if they are within the control of the executive department of the Government.

ATTORNEY GENERAL'S OFFICE,
March 9, 1867.

SIR: In your letter transmitting the papers relating to the claim of John Devlin, and the report of the Comptroller of the Treasury thereon, you request my opinion on the points stated in that report. "The first and most important point," says the Comptroller, "goes to the jurisdiction of the commission to sit in Washington and try a citizen of New York (and a civilian) for offences committed in that State, and within the jurisdiction of the civil courts, which were in the full possession and exercise of all their powers."

1. There can be no doubt, under the recent decision of the Supreme Court in the cases of Milligan and others, that the military commission which tried and sentenced John Devlin had no jurisdiction of the subject-matter or of the party.

2. It follows from this conclusion, that if the provost marshal general, or any officer or agent of the Govern-

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ment, seized the moneys and effects of Devlin, in execution of so much of the sentence of the commission as imposed a fine of $10,000, such seizure was wholly illegal.

3. It also follows, from the view taken of the jurisdiction of the commission in this case, that if the moneys and effects in question came into the possession of the Government through or by means of such a seizure by one of its officers or agents, they should be restored to the party, unless they have been covered into the Treasury of the United States, and are thus beyond the control of the Executive.

4. The Comptroller has reported, that "by what means and for what purpose the bonds and moneys were obtained does not appear."

But I presume that he at the same time finds that there is no evidence that Devlin placed the moneys and securities in the hands of the party who receipted for them, for the purpose of satisfying his own fine or that of his brother.

This advances the inquiry one step toward the solution of the question of fact on which the Comptroller reports that no evidence appears, and excludes the conclusion that there was a voluntary payment by Devlin of the fine imposed by the military commission.

But the precise question, "by what means and for what purpose the property was obtained," is thus left still in doubt. On that question further investigation should be made in your department. I do not find any affidavit or other statement by the officers or agents of the Government concerned in the transaction, who can alone know the exact truth about the delivery and receipt of the moneys.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

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SECRETARY OF NEW MEXICO.

1. The term of the secretary of the Territory of New Mexico is limited to four years, and after its expiration the incumbent of the office has no right to exercise its functions.
2. The appointment of a person to that office and delivery to him of the commission operate as a removal of the incumbent.

ATTORNEY GENERAL'S OFFICE,
March 12, 1867.

SIR: In answer to your letter of the 15th ultimo, I have the honor to state, that I am of opinion that Mr. Arny is not "legally competent" to discharge the duties of secretary of the Territory of New Mexico, or to discharge the duties of the governor in the absence of the governor.

His office of secretary was limited in duration to a term of four years. It appears by the statement of facts submitted to me that his term of office commenced in February, 1863, so that it terminated in February, 1867.

There is not, as to the secretary, a provision of law, as in the case of the governor, that he should hold over after the expiration of his term until a successor shall be appointed and qualified.

In the absence of such a provision as to the secretary, the office becomes vacant.

This view makes it unnecessary to consider the question of Mr. Arny's removal from office during his term by the appointment and the delivery of a commission to Mr. Este for the same office. I may add, however, that in my opinion the removal was complete.

I am, sir, very respectfully
Your obedient servant,
HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

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CLAIM OF R. W. GIBBES.

The Secretary of State requested to furnish additional information in regard to that case.

ATTORNEY GENERAL'S OFFICE,
March 30, 1867.

SIR: I have read the note prepared by the examiner of claims in your department in relation to the claim of R. W. Gibbes, under the convention with New Granada, of September 10, 1857; but, upon the information contained in that note and the accompanying papers, I am not able to express any opinion on the question which you submit, whether the suspension of the claim of Mr. Gibbes should or should not be removed.

It is not at all clear to my mind that the commissioners under the treaty of February 10, 1864, did determine that the claim of Mr. Gibbes was one presented to, but not settled by, the former commissioners of September 10, 1857, and as such that it was a claim within their jurisdiction. On the contrary, it would seem that while the commissioners did determine the question of their jurisdiction in the four other cases which had been before their predecessors, they made no decision whatever in the case of Mr. Gibbes, but summarily struck it from their calendar.

I incline to think, in view of the action of the commissioners in this case, that the question may now be an open one, whether there was or was not a final determination of the claim of Mr. Gibbes by the first commission.

The information communicated to me does not enable me to give any opinion on that point. The proper evidence of the action of the first commission would seem to be the contents of its own journal or docket. They have not been laid before me.

I would respectfully request you to furnish me (in the event of a further reference of this case) with a full statement of the facts leading up to the question, together with

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copies of such original papers or documents as may be important for me to see in full.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

CHOCTAW COTTON.

Cotton belonging to a Choctaw Indian, produced by him in the territory of his nation and found beyond its limits, is not subject to the internal revenue tax.

ATTORNEY GENERAL'S OFFICE,
March 30, 1867.

SIR: I have considered the question presented in the case of R. M. Jones, a Choctaw Indian, that is to say, Whether cotton belonging to a member of the Choctaw nation of Indians, produced by him in the territory of that nation and found beyond that territory within the United States, is subject to the tax imposed by the internal revenue acts on all cotton produced within the United States?

I am of opinion that it is not; and will take occasion, at a future time, when I have more leisure than at present, to state the grounds of this opinion.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

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FEES OF DISTRICT ATTORNEYS.

1. In a case in which the duty of a district attorney to appear on behalf of the United States springs from the request of the head of a department, the legal fee for his services therein is the sum which the department may agree to pay him.
2. The act of August 16, 1856, section 12, does not alter the compensation provided in such a case by the act of February 26, 1853.
3. In a case within the terms of the act of 1856, the district attorney should be allowed such compensation as the proper head of department may have agreed to pay him.
4. The question whether fees in cases within the 12th section of the act of August 16, 1856, are to be included in the emolument accounts of district attorneys not considered in this case.

ATTORNEY GENERAL'S OFFICE,
April 29, 1867.

SIR: I have considered the question stated in your letter of the 29th ultimo, relative to the claim of B. D. Silliman, Esq., late United States attorney for the eastern district of New York, for compensation for professional services rendered, at the instance of your department, in the United States courts at New York, in the case of Cartwright & Harrison *vs.* The Schooner "Othello" and cargo.

It appears that during Mr. Silliman's incumbency of the office of district attorney a libel was filed in the district court at Brooklyn, by Cartwright & Harrison, against the schooner "Othello" and cargo, to enforce the lien of a bottomry bond executed by the master on the vessel, cargo, and freight, for repairs and expenses made and incurred at St. Thomas, in the West Indies, whither the vessel had been driven by stress of weather while prosecuting a voyage from Wilmington, North Carolina, to New York. The "Othello" was at the time under a charter to the Government. The cargo was the property of the United States. Mr. Silliman, at the instance of your department, intervened in the suit on behalf of the United States, and filed a plea to the jurisdiction of the court, which was sustained, as to vessel and cargo, by the

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district court. On appeal by the libellants to the circuit court, the decree of the district court was affirmed as to the cargo, but reversed as to the vessel.

Mr. Silliman has presented to your department an account for his services in this matter, which you have approved. The only question suggested is, Whether he is entitled, under the 12th section of the act of August 16, 1856, (11 Stats., 50,) to receive payment of the amount. That section provides, that "all accounts of the United States district attorneys for services rendered in cases instituted in the United States or State courts, when the United States is a party in interest, but not of record, shall be audited and allowed as in other cases, assimilating the fees, as nearly as may be, to those provided by said act of February 26, 1853, for like or similar services."

It is clear that Mr. Silliman was not bound to appear in the case mentioned without a request by the head of a department. It was not a case of crime against the United States, nor was it a civil action prosecuted by the Government. The United States was not a party of record, but merely a party in interest. In such a case, the authority and duty of the district attorney to appear spring, as I understand, from the request of the department whose general administrative business it may be to see that the interests of the Government are properly represented and protected. In a case of this character, the head of department requesting the district attorney to act on behalf of the Government has authority to stipulate, before or after the service is performed, as to the compensation payable to him, and the sum which the department may agree to pay for the service is the legal fee provided therefor by the act of February 26, 1853, denominated the fee-bill. (10 Stats., 161.)

The act of 1856 does not change the measure of compensation payable in such a case as this, under the fee-bill, to the district attorney. It provides that the services of district attorneys, in certain cases which are mentioned, shall be compensated at the same rate as that provided

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for like or similar services in the act of 1853. In order to obtain, therefore, the proper measure of compensation in a case falling within one of the classes of cases mentioned in the 12th section of the act of 1856, we must resort to the fee-bill of 1853, and ascertain what compensation is there provided for services in a like case. Now, by the fee-bill, the district attorney is entitled to receive for services in a case in which the United States was merely a party in interest, and the law officer was not legally bound to give his services without a request, such compensation as the department, at whose instance he appeared, may have agreed to pay him. If the services of Mr. Silliman were rendered in a case of this character, and I have already said they were, he should be allowed, under the act of 1856, the sum which you have deemed reasonable and proper, and, by approving his account, have agreed to pay him.

It has been said by Attorney General Black that the 12th section of the act of 1856 was intended for the simple purpose of compelling district attorneys to include in their emolument accounts the fees received from the Government for the services mentioned therein as well as other fees. (9 Opinions, 149.) I do not deem it necessary at present to enter upon that question. It will not arise in this case, unless it should appear that Mr. Silliman received from the other legal fees and emoluments of his office, during the year in which the services in question were rendered, his maximum compensation of $6,000, as provided by the 3d section of the act of 1853. If the fact should appear, from his emolument accounts in the office of the First Comptroller of the Treasury, that he reached his maximum allowance during that year, the question as to his right to receive payment of the fee charged in the case of the "Othello" will be for determination.

Before stating his account for services in that case, the First Auditor should ascertain from the First Comptroller of the Treasury whether Mr. Silliman reached his maximum compensation during the year those services were

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rendered. If it should appear that he did not, I am clearly of opinion that he is entitled to be paid the amount charged in the account presented to and approved by your department.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. EDWIN M. STANTON,
Secretary of War.

DELIVERY OF LETTERS.

1. Where a letter is sent through the post office to one person in care of another, it is the duty of the postmaster to deliver the letter to the former, if requested by him.
2. The postmaster has no authority in such a case to deliver the letter to the sheriff upon an attachment levied at the suit of creditors of the person to whom the letter is addressed.

ATTORNEY GENERAL'S OFFICE,
May 1, 1867.

SIR: I have read the letter of the postmaster at New York relative to the matter of certain letters in his official custody directed to Daniel T. Bradford and Bradford & Co., to the care of A. E. & C. E. Tilton, and am clearly of opinion, on the facts stated in that communication, it is the duty of the postmaster to deliver those letters to the parties to whom they are respectively addressed, without regard to the claim or demand of the parties, or any of them, to whose care they are so addressed.

In the case of a letter in the post office directed to A B, care of C D, the postmaster may, in the absence of any demand by A B, deliver the letter to C D; but if A B claim the letter and demand possession of it, the officer cannot lawfully deliver it to C D. A prohibition by C D, in conflict with a demand by A B, must be disregarded by the postmaster.

The sender, by this form of superscription and address,

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has expressed his intention to place the letter in the possession of the party it is addressed to, and it is the duty of the postmaster to carry out that intention. The words following the address—to the care of C D—are merely employed to facilitate the delivery to A B, and to authorize C D to receive it on his behalf. They cannot afford ground for a claim to the delivery of the letter to C D, as against a demand therefor by A B, to whom it is addressed.

The foregoing is a sufficient answer to the points stated in the letter of the postmaster. The papers accompanying his letter refer to proceedings instituted in the State court by certain creditors of the Bradfords, in which warrants of attachment against their property have been issued to the sheriff, who has obtained an injunction against the Bradfords, restraining them from receiving from the postmaster certain drafts, supposed to be contained in the letters referred to, or any of the packages or enclosures containing those drafts.

The postmaster has not been made a party to this injunction.

In regard to the attachments, it does not clearly appear whether the sheriff has attempted to execute them upon the postmaster.

It is stated in one of the papers that the postmaster has been served with notice of the attachment, and that the sheriff has demanded all letters coming through the post office to the Bradfords.

All that I need now observe, on this phase of the matter, is, that the postmaster has no authority to comply with the demand of the sheriff for the delivery of the letters to him.

I return herewith all the papers in this matter.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. A. W. RANDALL,
Postmaster General.

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PAY OF RETIRED NAVAL OFFICERS.

1. Section 20 of the act of July 16, 1862, fixing the pay of retired naval officers, does not repeal the previous laws authorizing promotion on the retired list.
2. The pay of retired officers of the navy is regulated in all cases by the provisions of the 20th section of the act of July 16, 1862.

ATTORNEY GENERAL'S OFFICE,
May 18, 1867.

SIR: By your letters of the 6th December, 1866, and 21st March last, I am requested to give an opinion respecting the rate of pay to which officers are entitled who have been promoted on the retired list of the navy or retired upon furlough pay.

I find that on the 16th of July, 1862, laws were in force authorizing the promotion of officers on the reserved or retired list, but with the condition annexed that such promotion should not enhance the pay.

Thus, up to that date, the pay and the rank of officers on said list were separable things. On that day the act took effect, entitled "An act to establish and equalize the grade of line officers of the United States navy," of which section 20 (12 Stats., 587,) provides "that the annual pay of retired naval officers shall be as follows, viz: admirals, $2,000; commodores, $1,800; captains, $1,600," etc., etc., embracing the several grades down to and including ensigns.

So that by this section the rank and the pay of a retired officer became correlative.

Every officer must have a definite rank, and as soon as that is ascertained, if he is a retired officer, this section constitutes his pay-roll, whether he attained that rank by promotion or otherwise.

If an officer's promotion was conditional upon his not receiving enhanced pay, and this law would give him more pay, either the promotion is rescinded or the condition is repealed. Without doubt the latter, and not the former,

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is the legal effect of the section cited, where the promotion had vested anterior to its passage.

Promotions made subsequently present another question. If lawfully made, there can be no question that the rank bestowed actually bestowed the pay of that rank, because the law says so.

But does the law (section 20 of the act of 16th July, 1862) fixing the pay of retired naval officers, or any other law, repeal so much of previous laws as authorizes promotion on the retired list? I think not. Congress may authorize promotions on the retired list with or without enhancement of pay.

If at first without, they may afterwards make it *with* the pay. If a law passes, giving *all* who hold a certain rank a certain pay, and some of that certain rank previously had less pay than others, such a law would leave the authority for promoting where it found it, but would repeal the condition that the promotion should not work an enhancement of pay, by ordaining that the pay should in all cases follow the rank. And the same view applies where the retired officer, having a definite rank, was under any other restriction as to his pay.

It is therefore my opinion, that the act of 16th July, 1862, made no change in the manner of fixing and ascertaining the rank of any retired naval officer, but changed the rate of paying some of them, by providing that in every case of equal rank there should be equal pay, the amount of which is set forth in the law.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. GIDEON WELLES,

Secretary of the Navy.

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CLAIM OF SNOW, COYLE & CO.

The President advised that no ground exists for reversing the order of the Secretary of War disallowing the claim of these parties for publishing the evidence in the case of the assassination conspiracy.

ATTORNEY GENERAL'S OFFICE,
June 5, 1867.

SIR: I have the honor to state, that I have examined the claim of Messrs. Snow, Coyle & Co., publishers of the National Intelligencer, against the War Department, for the sum of $19,238, for publishing the evidence in the assassination case against Payne, Surratt, and others.

It appears that upon the presentation of this claim to the War Department the Secretary of War, on the 21st of August last, rejected the same, and endorsed a formal disallowance, stating that the publication was not made at the request or by the authority of the War Department.

I have carefully examined all the papers enclosed to me, and can see no ground for reversing the decision which has been made by the Secretary of War, or for ordering the payment to be made of this claim.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

The PRESIDENT.

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THE RECONSTRUCTION ACTS.

1. The questions arising upon the construction of the act of March 2, 1867, "to provide for the more efficient government of the rebel States," and the supplementary act of March 23, 1867, submitted by the commanders of the military districts of the South to the President for his instructions, considered and determined by the Attorney General.
2. The duties and powers of the boards of registration constituted by the act of March 23, 1867, considered.

ATTORNEY GENERAL'S OFFICE,
May 24, 1867.

SIR: I have the honor to state my opinion upon the questions arising under the act of March 2, 1867, entitled "An act to provide for the more efficient government of the rebel States," and the act of March 23, 1867, entitled "An act supplementary to an act entitled 'An act to provide for the more efficient government of the rebel States,'" upon which questions the military commanders of the districts in which those States are comprised have asked your instructions.

The first and most important of these questions may be thus stated: Who are entitled to vote and who are disqualified from voting at the elections provided for or coming within the purview of these acts?

The first provision upon this subject is to be found in the 5th section of the original act, and declares the qualifications and disqualifications of the voters for the election to be held for delegates to the proposed constitutional convention in each State, and for the election to be held for the ratification of the constitution that may be framed by such convention. That section provides that the delegates to such convention shall be "elected by the male citizens of said State twenty-one years old and upwards, of whatever race, color, or previous condition, who have been resident of said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion or felony at common law," and that the same qualifications so required for the

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election of the delegates shall also be required upon the election for ratification. The *proviso* to this section also excludes from the right to vote for delegates to the convention every person excluded from the privilege of holding office by an amendment to the Constitution of the United States proposed by the 39th Congress, and known as Article XIV.

The 6th section provides "that until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote under the provisions of the 5th section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the 3d article" [section] "of said constitutional amendment."

It is to be observed here that the qualifications of a voter are, by the 5th section, limited to the election of delegates to the convention, and to the question whether such convention shall or shall not be held, and that no qualification is declared for a delegate so to be elected; but by the 6th section the same qualifications as to a voter are required in all elections to any office under the existing provisional governments during their continuance, and, as to *eligibility* at such elections, certain classes are excluded.

The 1st section of the supplemental act provides that "the commanding general of each district * * shall cause a registration to be made of the male citizens of the United States, twenty-one years of age and upwards, residents in each county or parish in the State or States included in his district, which registration shall include only those persons who are qualified to vote for delegates" by the original act.

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The person offering himself for registration is also required to take an oath, which, for convenience, I now divide into paragraphs or sections, preserving as near as may be the language of the act. He must swear or affirm as follows:

1. That he is a citizen of the State, and has resided in said State for — months next preceeding the day when he takes the oath, and that he now resides in the county of —, or in the parish of —, in said State.

2. That he is twenty-one years old.

3. That he has not been disfranchised for participation in any rebellion or civil war against the United States, nor for felony committed against the laws of any State or of the United States.

4. That he has not been a member of any State legislature, nor held any executive or judicial office in any State, and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof.

5. That he has never taken an oath as a member of the Congress of the United States, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof.

6. That he will faithfully support the Constitution and obey the laws of the United States, and will, to the best of his ability, encourage others so to do.

The second section of this act provides, after the completion of this registration in any State, and after at least thirty days' public notice of the time and places which the commanding general shall appoint and direct, that an election shall be held for delegates to a convention; and a rule is given to fix the number of the delegates to be elected, and the appointment of these delegates in the proper civil subdivisions, giving to each subdivision representation in the ratio of the registered voters.

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The 3d section provides that at the election for delegates the registered voters shall vote for or against the convention.

The 4th section provides for the election to ratify the constitution that may be framed by the delegates, and the right to vote at this election is confined to the persons registered.

The 6th section provides that all elections in the States mentioned in the said original act shall, during the operation of such act, be by ballot; and all officers making the said registration of voters and conducting said elections shall, before entering upon the discharge of their duties, take an oath prescribed by the act of July 2, 1862, entitled "An act to prescribe an oath of office."

The first consideration which requires my attention upon the question as to the right to vote arises upon the registration of voters. The question of qualification or disqualification is fixed by the registration. No power is given to any other board or any other authority, after the registration is completed, to change the registry.

The persons whose names are admitted to registration are entitled to vote, subject to the limitation hereinafter mentioned, and none others. This registration must be completed before the 1st day of September, 1867.

The functions of the board, as a board of registration, cannot be extended beyond that fixed time; but after that the duties which remain to be performed by the officers composing this board are limited only to holding and superintending the elections, and making the proper returns to the commanding general.

This brings us to the direct question, Who are entitled to registration?

1st. As to citizenship and residence, no person is entitled to vote who shall not be resident in the State for one year previous to the day of election.

It is not necessary that this previous residence for a year should exist at the time the person applies for registration.

A person in all other respects entitled to vote is entitled

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to registration, although he has not at that time been a resident of the State for a full year; for we find in the supplemental act that the oath as to residence does not require the applicant to swear that he has then been a resident for a year, but only requires him to state the number of months of his residence, contemplating a period less than, as well as, a full term of twelve months.

Therefore, as to such a person so registered, if it happen at any election subsequently to be held that the time of residence, counting from the day of election, does not cover an entire year, he cannot vote at such election; for this supplemental act does not, as to residence, change the provisions of the original act, as it is expressly provided by it, as to registration, that it shall include only those who are qualified to vote by the original act.

To carry out the purpose of the law in this respect as to residence, the board of registration should note opposite the name of the person whose residence has not extended to the full term the exact time of his residence.

As to citizenship: The qualification stated in the original act is citizenship of a State; but by the first clause of the 1st section in the supplemental act the registration is to be made of the male citizens of the United States; and as to the oath, the applicant is only required to swear that he is a citizen of the State.

I am of opinion that the phrase *citizen of the State*, as used in the oath, is intended to include only such persons as are citizens of the United States and citizens of the State; and that an alien, who has not been made a citizen of the United States, cannot safely take the oath. But as the board of registration have only authority to administer the prescribed oath, they cannot require any further oath or proof as to citizenship, and if an alien, not made a citizen of the United States, takes this oath, he takes it at his peril, and is subject to prosecution for perjury.

2d. As to age. No one is entitled to registration who is not at least twenty-one years of age on the day that he applies for registration.

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In this respect qualification as to age differs from the qualification as to residence, and the fact that majority must exist at the date of registration has relation to the day of registration, and not to the day of the subsequent election.

3d. Next as to disfranchisement. I shall consider the various clauses of disfranchisement according to the order and division into sections hereinbefore stated.

And, first, as to the general clause declaring disfranchisement.

The 5th section of the original act denies the right to vote to "such as may be disfranchised for participation in the rebellion or for felony at common law."

The words here used, "in the rebellion," must be taken to mean the recent rebellion; but the supplemental act enlarges the disqualification, and requires the applicant to swear that he has not been disfranchised for participation in any rebellion or civil war against the United States, nor for felony committed against the laws of any State or of the United States.

What, then, works a disfranchisement under these provisions? Whether we consider this disability as arising out of participation in a rebellion or the commission of a felony, the mere fact of such participation or of the commission of the felonious offence does not of itself work a disfranchisement. It must be ascertained by the judgment of a court, or by legislative act passed by competent authority.

Disfranchisement for felony committed against the laws of a State or of the United States, consequent on a conviction in the courts either of the United States or of a State, or declared by the laws of either, would be fatal under these acts.

I am not aware of any law of the United States which works disfranchisement as to the right of suffrage by force of the act itself, nor does such a consequence follow from the conviction for treason, or conspiracy to commit treason, or for any other act of participation in rebellion.

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The provision in the Constitution of the United States as to treason against the United States does not declare what shall be the punishment on conviction of treason. This is left for Congress, with the limitation that corruption of blood shall not follow as a consequence, or any forfeiture, except during the life of the party. Congress, in the exercise of its power to declare the punishment, has limited such punishment, as a consequence of conviction, to the penalty of death, or imprisonment and the manumission of slaves owned by the party, and to disqualification from holding any office under the United States.

I am not advised of any statute now in force in either of these ten States, except perhaps Virginia, which declares disfranchisement as to the right of suffrage by force of the act itself.

The 4th and 5th sections may be considered together.

The party applying for registration must swear "that I have never been a member of any State legislature, nor held any executive or judicial office in any State, and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof; that I have never taken an oath as a member of the Congress of the United States, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof."

These clauses of the oath, in effect, extend the disfranchisement beyond the provisions of the original act and the prior clauses of the oath itself, in the important particular that neither a conviction, nor judgment of a court, nor an express legislative enactment, is required to establish the fact of disfranchisement.

In legal parlance, disfranchisement under these clauses of the oath results from matters *in pais*. But in one respect these clauses limit the generality of the original

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act as to disfranchisement. The original act contemplates disfranchisement arising from participation in a rebellion. Whereas disfranchisement under these clauses does not arise from participation in rebellion alone, but other elements must concur; that is to say, the holding of certain offices, or the taking an official oath by certain officers, and afterwards participating in rebellion against the United States.

The consideration of these two clauses leads to two distinct subjects-matter of inquiry.

First. What offices or officers are comprehended?

Second. What acts amount to engaging in insurrection or rebellion against the United States, or giving aid or comfort to the enemies thereof?

I will first consider what offices or officers are comprehended.

As to some officers, there is no room for doubt. Members of a State legislature or members of Congress are clearly enough designated.

The question might, however, arise whether a convention held in a State for the framing or amendment of its constitution would answer to the description of a State legislature within the meaning of this act. Such a convention, although it is clothed with legislative power, cannot properly be denominated a State legislature. And in the acts now under consideration a convention and a legislature are expressly distinguished from each other, for they require the constitution to be framed by a convention, and they require the legislature of the same State to adopt the constitutional amendment.

When, then, in the same acts, they again use the phrase "legislature of the State," they must be understood to use it in the same sense, and as distinguished from a constitutional convention.

But as to those legislative bodies which passed what are called ordinances of secession, or by whatever name they may have been called, I am of opinion that their members

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are properly comprehended within this disqualifying clause, for I can imagine no official legislative position in which the duty of allegiance was more distinctly violated.

The next and more difficult inquiry is, Who is to be considered an officer of the United States, or an executive or judicial officer of any State, within the meaning of these clauses? Various classes of officers are here intended: State officers and federal officers, and executive or judicial officers.

No legislative officer is mentioned, except a member of a State legislature or a member of Congress. The descriptions used as to other officers are, as to State officers, that they must be judicial or executive, and as to a federal officer the terms executive or judicial are not expressed.

He is described simply as an officer of the United States.

It has been shown that federal officers and State officers are classified separately in the clauses of the act under consideration.

I deem it profitable and conducive to a clear order to follow this classification. I shall, accordingly, first consider what State officers are included in the terms "executive or judicial." This phrase is twice used in these clauses, with the superadded description "*in* any State" in the first clause, and "*of* any State" in the second clause. I think the controlling term of description, if there is any repugnancy in the terms, must be taken to be the last, for that is used in the most comprehensive clause, as to the very officers named in the first clause and in others. Besides, it is the same term of description used in the act of Congress of 1789, declaring what State officers are required to take the oath to support the Constitution of the United States, and in the 3d section of the constitutional amendment. Both use the same terms of description, "executive and judicial officers *of a State.*"

The terms are so general and indefinite, that they fail to express with sufficient certainty a designation of the persons intended to be reached. It is to be regretted, in

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a matter of so much importance, that the rule of designation adopted as to members of Congress and of a State legislature had not been followed up; or, if that were found impracticable, that some more definite general rules had not been declared. The uncertainty becomes manifest in the application of the law, and this uncertainty necessitates construction. The necessity for construction, which arises from the generality of the law, cannot be better stated than in the language of Plowden:

"Though the words be general, they are to be reduced to a particularity by exposition, made according to the intent of the act; those statutes which comprehend all things in the letter, the sages of the law have extended but to some things; those which generally prohibit all people from doing such an act, they have interpreted to permit some persons to do it; and those which include every person in the letter, they have adjudged to reach some persons only, all founded upon the intent, collected by considering the cause and necessity of the act, and comparing one part with another, and sometimes by foreign circumstances."

I deem it proper here to fix some clear ideas of the general intent of these acts, and by what rule of construction, strict or liberal, that intent may best be arrived at.

The intent, as expressed, is to enable the people of each of these States to frame a constitution for the State by the exercise of the right of suffrage.

There are clauses of the act giving the right by general terms of description to the people generally, and especially to those who have never enjoyed the right before.

There are other clauses of the act which, by general terms, take away this right of suffrage from those who have always enjoyed it.

The rule of construction as to the clauses which give the right must be liberal, and, as to them, the general terms are not to be restricted; but as to those clauses which derogate from the existing right, the rule of construction must be strict, that none should be excluded who are not clearly within the letter and intent.

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1. I begin then with the inquiry whether officers of the militia of a State are embraced within these terms of description, and I have no doubt that they are not. Certainly Congress, as to the officers of a State, was not content to use the term at large and without qualification, but, as we see, intended to qualify the general term.

If the purpose was to designate military officers, the usual words to manifest that intent would have been adopted, and the terms would have been the *judicial* and *executive:* the *civil* or *military* officers of the State.

Accordingly we find, when that was the purpose, as we see it was in the third section of the constitutional amendment known as article XIV, Congress expressed that purpose very clearly.

That section provides that "no person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

This third section is expressly referred to more than once in these acts. It is made, in fact, a part of these acts. Its language is followed, word for word, in these disqualifying clauses, as far as was possible, except in the particular in which one is made to apply to eligibility and the other to the right to vote.

When, therefore, we find that Congress, in declaring what persons shall be disfranchised from holding any office, expressly includes military as well as civil officers, as in the third section of the amendment, and in providing what persons shall be disfranchised from voting who held any office, omit to mention military officers, we cannot escape the conclusion that military officers were not here within their contemplation.

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It is impossible to imagine a case in which the construction from laws in *pari materia* has a more cogent application; for it is evident here that the law-maker, in framing the disqualifications of the voter, took special cognizance of the third section of the amendment, and weighed it word by word, following it literally for the most part, and rejecting deliberately the very word intended to embrace a military officer.

It must be borne in mind that we are here considering the class of military officers who were such prior to the rebellion, when the office was lawful, and who were known as officers of the militia: not that class who became military officers during the rebellion.

As to this last class, they all come under that other clause of disqualification which applies to participation in the rebellion.

2. Having the inquiry thus circumscribed to civil officers, the question recurs, what civil officers are to be brought within the terms "executive or judicial officers of a State?" They clearly include, so far as executive officers are concerned, all such officers as are generally known by the proper description of State officers or officers of a State.

In one sense, and in a popular sense, the description, executive officers of a State, is applicable to a well-known class: the governor, lieutenant governor, State auditor treasurer, secretary, and State officials proper, who exercise executive functions at the seat of government.

I am not prepared to say that only these proper State officials come within this term of description; nor am I prepared, as to judicial officers of a State, to limit the description to judges, or courts whose jurisdiction extends over the entire State. I must content myself in saying of these officers, executive or judicial, that they are clearly within the meaning of the law.

Now, changing the inquiry from an affirmative to a negative process, such officers as usually pass under the description *municipal* do not come within the purview of

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the act, such as officers of cities, towns, villages, and subordinate municipal divisions, whether their functions are executive or judicial, or, as is sometimes the case, where the same officer acts in both capacities.

Outside of these two representative classes, the first of which is clearly within and the last of which is clearly without the purview of these clauses, we find in each of these States a host of officers whose *status* is in some way to be determined.

It is impossible here to proceed by way of enumeration, and to distinguish by name all those who are included and all those who are excluded. All that can be done is to establish some fixed rules.

I feel the necessity of circumspection here in saying who are included within the disfranchisement rather than in saying who are not included; for where there is doubt, according to the rule of construction which has been referred to, that doubt must be solved in favor rather than against the right of the voter.

The exclusion is all-comprehensive as to time, and applies not only to those who were in office when the rebellion commenced, but to those who held the prohibited offices at any previous time, although they may have ceased to hold such office an indefinite number of years prior to the rebellion.

It is founded on the idea of a breach of official trust due to the State, as the author or donor of the trust. It is founded on the idea of a breach of trust, not arising merely from allegiance as a citizen, but duty to the State in a direct official relation to that State, and through that to the Federal Government.

So far as this act designates by name the persons who violated such a trust, it is that class to whose keeping the trust is especially confided, that is to say, the persons who were clothed with the legislative power.

Where, as in this instance, there is a purpose of exclusion on a common ground, and one class is designated as coming within the purpose, and other classes are left

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indefinite and only to be ascertained by construction, it is allowable to find the indefinite class by the rule of assimilation.

We see, then, in this law a purpose of exclusion as to the three great departments of a State—legislative, judicial, and executive.

We see, further, that as to the legislative department, made up of a legislative body, composed of members and various officers appertaining to such a body as a legislature, the exclusion is only of the higher functionaries of that body, the *members*, and is not carried to its subordinate officers.

The terms of exclusion are not the members and officers of a State legislature, but simply the *members* of a State legislature.

As, therefore, the exclusion of the legislative department has effect only upon the highest class in that department, it is safe to say that the same policy of exclusion attaches rather to such officers as exercise functions of important trust in the executive and judicial departments than to those whose functions and duties are merely limited and subordinate.

I have already called attention to the comprehensiveness of these exclusions as to time.

Now, to declare them equally comprehensive as to persons, and to say that they embrace all officers, large and small, coming in any sense within the description of executive or judicial officers, who have at any time during their lives held any one of these offices, would have this inevitable result, that, in the formation of the constitution for a State by the agency of its own people, a large proportion, perhaps a majority, of the most intelligent and capable of the people would be excluded.

There is no part of my duty, in attempting to give construction to these laws, in which I find myself involved in such painful uncertainty as in determining what officers outside of the classes already designated come within the just range of exclusion.

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I have said, that in addition to the class of officers who clearly come within the terms of the act, as *judicial* and *executive* officers of the State, and to those classes which comprehend militia officers and municipal officers, who clearly are not within the terms of the act, there remain a vast body of officers whose *status* is in some way to be defined.

These are known in popular language by such terms of description as county, township, precinct officers: their name is legion.

Their functions and duties are, for the most part, strictly local. Some of them, such as sheriffs and justices of the county courts, have jurisdiction over the entire county; others are restricted to the smallest civil subdivisions.

I have directed abstracts to be prepared for each of these States, which will exhibit all these officers, and the duties which appertain to them, and the form of oath required.

I must reserve for further consideration, after the abstracts are made, the question whether all of them, or, if not all, what classes of these officers, come within the disqualification.

As to all other executive or judicial officers, who are not in popular language characterized as county officers, I incline to consider them as coming under the description of executive and judicial officers of a State, within the meaning of these laws.

I deem it proper here, in reference to that class of officers, judicial or executive, who are by the rule I have laid down brought within the operation of disfranchisement, to distinguish a class whose duties are not localized, who stand in direct relation to the State, and who in my opinion cannot properly be designated as executive or judicial officers of a State.

I mean that class of persons who exercise special public duties rather in the nature of occasional employments than general and continuing official duty.

This distinction between office and employment, and between an officer of a State and an agent of a State, is

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well established. Chief Justice Tilghman (in 3 Serg. & Rawle, 149) recognizes it in the case of commissioners appointed to lay out roads and canals and other works of public improvement.

The question arose upon a section in the constitution of Pennsylvania, which provided "that the governor shall appoint all officers whose offices are established by this constitution, or shall be established by law, and whose appointments are not herein otherwise provided for."

The chief justice says: "It has never been ascertained, nor is it easy to ascertain, to what offices this power of appointment extends. I speak of offices created by law *since* the making of the constitution.

"The word *office* is of very vague and indefinite import. Everything concerning the administration of justice, or the *general interests of society*, may be supposed to be within the meaning of the constitution, especially if fees or emoluments are annexed to the office.

"But there are matters of temporary and local concern, which, although comprehended in the term *office*, have not been thought to be embraced by the constitution. And when offices of that kind have been created, the legislature has sometimes made the appointment in the law which created them, sometimes given the appointment to others than the governor, and sometimes given the power of removal to others, although the appointment was left to the governor. The officers of whom I am speaking are often described in acts of assembly by the name of *commissioners;* such, for instance, as are employed in the laying out of roads and canals and other works of a public nature. Yet all these perform a *duty*, or, in other words, exercise *an office.*"

I cannot enumerate all the employments under State authority which, in my opinion, work no disfranchisement. I will name some by way of illustration, viz: boards of commissioners of public works, directors of State asylums, visitors of State universities, directors of State penitentiaries, State directors of banks or other corporations,

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special commissioners or agents appointed by the governor or other State authority to perform special duties, as examiners of banks, notaries public, and commissioners to take acknowledgment of deeds.

The rule laid down and these illustrations will perhaps be sufficient to determine who come within its operation.

The next disqualifying clause is founded on the oath of office. The oath, as incidental to the office, is not mentioned in the first disqualifying clause, but the office alone.

But in the second clause the oath is made to enter as a necessary element in order to work disfranchisement, and it is applied to the same classes of officers named in the first clause, and also to others not named in the first clause, that is, to officers of the United States.

It is an oath to support the Constitution of the United States, and it is clearly provided by this clause that if this oath had been taken by a member of a State legislature, or by an executive or judicial officer of any State, then such person, violating that oath and engaging in insurrection, shall be disfranchised.

There is some obscurity in these clauses, and room for doubt whether disqualification under the first clause would arise in the case of a member of a State legislature, or any executive or judicial officer of any State who had not taken an oath to support the Constitution of the United States.

I incline to the opinion that this oath is put as an essential thing, the breach of which by insurrection against the United States violates the trust imposed by it upon the officer.

But this clause, so far as the executive or judicial officers of a State are concerned, does not enlarge the class subject to disfranchisement. The officer breaking the oath which works disfranchisement must also be a judicial or executive officer of a State, according to the rule heretofore established.

I do not apprehend that any practical question will arise here, for by the Constitution of the United States this oath is required to be taken by "the members of the sev-

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eral State legislatures, and all executive and judicial officers, both of the United States and of the several States," and in these ten States the same oath was required as to members of the legislature and the executive and judicial officers of the State.

This brings me to the question, Who is to be considered "an officer of the United States," within the meaning of the clause under consideration? Here the term officer is used in its most general sense, and without any qualification, as legislative, or executive, or judicial; and I think, as here used, it was intended to comprehend military as well as civil officers of the United States who had taken the prescribed oath. Inasmuch as the violation of the official oath and the official trust has relation to fealty to the United States, which is broken by rebellion against the United States, the reason is apparent for including all officers of the United States, and for making the disfranchisement more general and comprehensive as to them, standing, as they do, in more direct relation and trust to the United States than the officers of a State.

I now come to consider what is the meaning and scope of the disqualification arising upon that part of the oath which requires the person to state that he has not "engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof." I must here repeat what has been said before, that to work disqualification two elements must occur—

First. Holding the designated office, State or federal, accompanied by an official oath to support the Constitution of the United States; and

Second. Engaging in rebellion against the United States, or giving aid or comfort to its enemies.

Both these must not only concur, but they must concur in the order of time mentioned. First, the office and the oath, and "afterwards" engaging in rebellion, or giving aid or comfort.

A person who has held an office within the meaning of this law, and has taken the official oath, and who has not

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afterwards participated in a rebellion, may very safely take this oath; and so, too, the person who has fully participated in the rebellion, but has not, prior thereto, held an office and taken the official oath, may with equal safety take this oath.

My duty here is simply one of construction. I do not deem it proper to enter upon any question of the constitutionality of this part of the act.

Taking it as granted, for the purpose of construction, that Congress has a right to impose such an oath, it is not only allowable, but imperative, that I keep in view its essential characteristics.

It is something more than a legislative act of derogation of an existing right. It is in effect a law which takes away an existing right as a consequence of acts done at a prior time, and which, at the time they were done, entailed no such consequences. In the late cases before the Supreme Court of the United States upon the test-oath prescribed by an act of Congress to be taken by lawyers, by which the exclusion from the right to practice their profession was made to arise upon prior participation in the rebellion, the court say:

"As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions, or any of the ordinary avocations of life, for past conduct, can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and, instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties."

The court further say: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."

The characteristics of this clause of the act are, therefore, retrospective, penal, and punitive. Of course there

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can be no question as to the rule of construction which is here to be applied.

Those who are expressly brought within its operation cannot be saved from its operation. Where, from the generality of terms of description, or for any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law and in favor of the voter.

What acts, then, within the meaning of this law, make a party guilty of engaging in insurrection or rebellion against the United States, or of giving aid or comfort to the enemies thereof?

The language here comprehends not only the late rebellion, but every past rebellion or insurrection which has happened in the United States. So, too, it comprehends every foreign war in which the United States has at any time been engaged. The first part of the sentence covers the case of domestic war existing in form of rebellion or insurrection, whilst the last part applies to foreign war. The words *giving aid and comfort* to the *enemies* of the United States, are the same used in the constitutional definition of treason, and the enemies there meant must be taken to be foreign enemies.

These words, originally found in the early statutes of England against treason, have received that settled interpretation in the English and the American courts. They are used in this act without any qualification, and we give them full force and application when they are made to apply to adherence, or giving aid and comfort to foreign enemies.

Such an act, as to the breach of the oath or duty of allegiance, stands upon the same policy of disqualification as engaging in rebellion or civil war. A person, therefore, who gave aid and comfort to our enemies in the war with Great Britain of 1812, and in the war with Mexico in 1847, would, in that particular, come within this clause.

In laying down this rule, I do not forget that, for certain purposes and in a certain sense, every citizen in the rebel States, during the late rebellion, is to be considered a pub-

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lic enemy, as in respect to the liability of his property to capture as prize of war, and in respect to various acts of Congress passed during the rebellion, which, as to property, declare its liability to capture, forfeiture, or confiscation, when used in aid of the late rebellion. But wherever, in any of these acts of Congress, these terms, *aid and comfort*, are used in any other than the commonly received acceptation, some qualification or description is added to make them apply to the rebellion. Nevertheless, although I strongly incline to think that the *aid and comfort* here mentioned should strictly be confined to its acknowledged legal interpretation, I am not quite prepared to say that Congress may not have used it as applicable to the rebellion. I shall, therefore, allow it due weight in the next inquiry, in giving construction to the clause now to be considered.

We are now to inquire what is meant by engaging in insurrection or rebellion against the United States. The force of the term to *engage* carries the idea of active rather than passive conduct, and of voluntary rather than compulsory action. Take, as an instance, a rebel soldier, compelled to service by force of conscription. Take, as another instance, the case of a slave, who, by the command of his master, or by military order, has served in the ranks or aided in the construction of military works. It would be an abuse of language to hold that in these instances the parties have "engaged" in rebellion, within the meaning of that word as used in this law.

But whilst, in my opinion, a conscript or slave, forced into the ranks, or other military service, is not included, it does not follow that other classes than those who actually levied war and voluntarily joined the ranks of the rebels are to be excluded, taking it to be clear, that in the sense of this law persons may have engaged in rebellion without having actually levied war or taken arms.

All those who, in legislative or other official capacity, were engaged in the furtherance of the common unlawful purpose, or persons who, in their individual capacity, have

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done any overt act for the purpose of promoting the rebellion, may well be said, in the meaning of this law, to have engaged in rebellion.

All persons who, during the rebellion, acted in an official capacity, where the duties of the office necessarily had relation to the support of the rebellion, such as members of rebel legislatures and of the rebel congress and rebel conventions, diplomatic agents of the rebel confederacy, or such other officials whose duties more especially appertained to the support of the rebel cause, must be held to come within the terms of exclusion. Officers in those rebel States who, during the rebellion, discharged official duties not incident to war, but in the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion.

The interests of humanity require such officers for the performance of such official conduct in time of war or insurrection as well as in time of peace, and the performance of such duties can never be considered as criminal. I cannot bring myself to the conclusion that Congress could have meant that such purely civil and necessary offices involved the incumbent in the guilt of insurrection.

Nothing but the most cogent language, such as was used in the test-oath for lawyers, could manifest such a purpose.

The Supreme Court, in construing that test-oath, and in reference to the clause to which I have alluded, uses this language:

"The third clause applies to the seeking, acceptance, or exercise, not only of offices created for the purpose of more effectually carrying on hostilities, but also of any of those offices which are required in every community, whether in peace or war, for the administration of justice and the preservation of order."

I find no such purpose in the use of any of the terms of the act now under consideration.

I am accordingly of opinion, that the holding of a simple judicial office, or other executive offices or public employments as are of a purely civil character, such as county

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officers, municipal officers, and all others of a like nature, which were not "created for the purpose of more effectually carrying on hostilities," and which did not involve the performance of duties expressly in furtherance of the rebellion, do not, within the meaning of this part of the oath, fix on the incumbent the guilt of engaging in the rebellion.

So much for official participation. I now recur to what amounts to individual participation in the rebellion.

In the attempt to arrive at the classes of persons, or of acts intended to be comprehended in the matter of engaging in the rebellion, we must have due regard to the subject-matter.

Undoubtedly, although every rebellion against the United States is comprehended, it is the late rebellion which almost, if not altogether, can be said to be the proper subject-matter—a rebellion which extended over eleven States of the Union, involving, more or less, millions of their people, continuing for more than four years, and maintained by a vast military authority, which, as to all these people for a time, and as to most of them during its continuance, excluded them from all protection under the lawful Government.

The obligations of allegiance, when thus separated from the corresponding right of protection, and the breach of that allegiance, are necessarily modified under such circumstances. The obligation is less stringent, and a breach of that obligation less reprehensible, than in cases of temporary or local insurrection.

Nor must we forget that throughout these rebel States there were large classes of their population more or less opposed to the rebellious movement, and who were yet more or less necessarily involved in its support.

I have already said that the language used in this act as to participation carries the idea of voluntary participation; and I am satisfied that these considerations, growing out of the nature of the rebellion, induced Congress to use the word "engage" in the sense of voluntary participation.

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When an insurrection by its continuance and power takes the form of a *de facto* government, and prescribes and enforces laws over people within its territory, individual rights and obligations undergo an inevitable modification, and the rightful and displaced authority, when it again comes into place, must, in a measure, accommodate its action to circumstances, and consider many things as rightfully done which in a mere insurrection would have no color of legality.

This principle is recognized by all civilized nations: has been especially enforced in England by statute and by the decisions of courts as early as the reign of Henry VII.

Obedience to the *de facto* government established under a usurping monarch has been held not to involve a subject in the guilt of treason to the lawful king. Giving due weight to these well-established principles, I proceed with the inquiry.

I am of opinion that some direct overt act, done with the intent to further the rebellion, is necessary to bring the party within the purview and meaning of this law.

Merely disloyal sentiments or expressions are not sufficient.

The person applying for registration is not required to clear himself from the taint of disloyalty.

The meaning of Congress here becomes yet more evident when we look at the last clause of the prescribed oath. He is required to swear that he "will faithfully support the Constitution and obey the laws of the United States, and will, to the best of [his] ability, encourage others so to do."

This part of the oath is not exculpatory, but promissory. It looks to the future, and not to the past, and the purpose is here manifest to omit, as to the right to vote, the disqualification arising from past disloyalty, put in the test-oath as a disqualification from the right to exercise office.

Mere acts of common humanity and charity cannot be considered as involving the party in participation in the rebellion.

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So, too, are forced contribution by the rebel authorities, or the compulsory payment of taxes in aid of the rebel cause.

But wherever an act is done voluntarily in aid of the rebel cause it would involve the person, and it must work disqualification under this law.

Voluntary contributions in furtherance of the rebellion, or subscriptions to the rebel loans, and even organized contributions of food or clothing, or necessary supplies, except of a strictly sanitary character, are to be classed with the acts which disqualify.

The Board of Registration.

The original act contains no provision as to the manner and time for holding the elections of delegates to the convention, or for ratification of the constitution framed by that convention, or for other purposes.

The 1st section of the supplemental act provides that a registration of the voters shall be made before the 1st of September, 1867.

The 4th and subsequent sections of this act provide for the means by which this registration is to be effected.

The commanding general is directed to "appoint as many boards of registration as may be necessary, consisting of three loyal officers or persons, to make and complete the registration, superintend the election, and make return to him of the votes, lists of voters, and of the persons elected as delegates by a plurality of the votes cast at said election; and upon receiving said returns he shall open the same, ascertain the persons elected as delegates according to the returns of the officers who conducted said election, and make proclamation thereof; and if a majority of the votes given on that question shall be for a convention, the commanding general, within sixty days from the date of election, shall notify the delegates to assemble in convention, at a time and place to be mentioned in the notification; and said convention, when organized, shall proceed to frame a constitution and civil government, according to the pro-

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visions of this act and the act to which it is supplementary; and when the same shall have been so framed, said constitution shall be submitted by the convention for ratification to the persons registered under the provisions of this act, at an election to be conducted by the officers or persons appointed or to be appointed by the commanding general, as hereinbefore provided, and to be held after the expiration of thirty days from the date of notice thereof, to be given by said convention, and the returns thereof shall be made to the commanding general of the district."

The 6th section provides: "That all elections of the States mentioned in the said 'act to provide for the more efficient government of the rebel States,' shall, during the operation of said act, be by ballot, and all officers making the same registration of voters and conducting said elections shall, before entering upon the discharge of their duties, take and subscribe the oath prescribed by the act approved July 2, 1862, entitled 'An act to prescribe an oath of office:' *Provided*, That if any person shall knowingly and falsely take and subscribe any oath in this act prescribed, such person so offending, and being thereof duly convicted, shall be subject to the pains, penalties, and disabilities which by law are provided for the punishment of wilful and corrupt perjury."

The only oaths prescribed by this act are the oath to be taken by the person applying for registration and the oath to be taken by the persons composing the board of registration.

The duties of the board are, first, to make and complete the registration and to superintend the elections.

The first question is as to the duties and powers of the board in making and completing the registration. The 1st section provides that the commanding general "shall cause a registration to be made of the male citizens of the United States, twenty-one years of age and upward, resident in each county or parish in the State or States included in his district, which registration shall include only those persons who are qualified to vote for delegates

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by the act aforesaid, and who shall have taken and subscribed the following oath or affirmation."

By this oath the person applying for registration must swear or affirm to every qualification provided for by the original act. The first question which arises here is, whether any other oath can be required of the person applying for registration, or any oath can be administered to any other person or persons touching the qualifications of the applicants by the board of registration.

The last clause of this 1st section provides as follows: "Which oath or affirmation may be administered by any registering officer."

The oath here referred to is the oath to be taken by the person applying for registration.

I have very carefully examined all the provisions of this act, and I can find no authority for any other oath to be taken by any one, touching the qualifications of the applicant for registration, but only this oath. I am clearly of opinion that any other oath touching the qualifications of the applicant would be extra-judicial and without authority, and that false swearing could not be assigned as perjury upon such unauthorized oath, especially as the proviso to the 6th section, above quoted, which declares what false swearing shall amount to perjury, is expressly limited to "any oath in this act prescribed."

In arriving at this conclusion, I have given due weight to that part of the 1st section of the act which declares that the "registration shall include only those persons who are qualified to vote for delegates by the act aforesaid, and who shall have taken and subscribed the following oath or affirmation." If we read these words by themselves, without regard to the other provisions of the act, the impression is made that two things must concur to authorize the registration of the applicant: first, that he actually possesses the qualifications required by the original act; and, second, that he shall take the prescribed oath.

But when we look to the qualifications required of the applicant by the original act, and find that he is required

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by this oath to swear to every one of these qualifications, and that no authority is anywhere given to enter upon any other inquiry as to his qualifications, or to administer any other oath to him, or any oath to any other person touching his qualifications, and that his oath, and his oath alone, is punished as perjury, it is impossible to resist the conclusion, that the oath itself is the sole and only test of the qualification of the applicant.

When, therefore, a person applies to the board for registration, the power of the board is confined to the administration of the prescribed oath, and if the applicant takes that, his name must go upon the registry. The board cannot enter upon the inquiry whether he has sworn truly or falsely. That inquiry must be reserved to the court which may afterwards have jurisdiction to try him on an indictment for perjury.

Next, as to the duties of the board after the registration is completed: They are to "superintend the election and make return * * * of the votes, lists of voters, and of persons elected," to the commanding general.

It is very clear from these provisions that, in superintending these elections, the duty of the board is to receive the votes of the persons whose names are upon the registration, and to reject all others. There is no provision anywhere to surcharge, or falsify, or to add a single name to the registration, or to erase a single name which appears upon it.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

The PRESIDENT.

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CLAIM OF BEALS AND DIXON.

Where Congress referred the claim of certain parties for an increase of prices, under a contract with the Government, to the Attorney General, for his opinion as to the construction of the contract, and the Attorney General gave his opinion against the construction contended for by the claimants, it was *held*, that this was a decision of the case, and not merely of the question, and that his successor in office had no right to reconsider the matter.

ATTORNEY GENERAL'S OFFICE,
June 25, 1867.

SIR: I have had under consideration the claim of Messrs. Beals and Dixon, and have now the honor to report my opinion thereupon.

On the 2d of May, 1866, Congress passed a joint resolution—

"That the Secretary of the Treasury is hereby authorized to cause the accounts of Beals and Dixon, for deliveries of material after May 1, 1861, under their contracts with the United States, to be adjusted and paid, allowing to said Beals and Dixon such additional prices for material delivered after May 1, 1861, as, in his opinion, they may be justly entitled to under the provisions of their supplementary contract, dated January 1, 1857: *Provided*, That, in the opinion of the Attorney General, said Beals and Dixon have a legal claim upon the United States for an increase of prices under said contract."

In your letter referring the case to me, you state that "on the 8th of May, 1866, the contract was submitted to the Attorney General, unaccompanied by any full statement of the facts of the case, or any report from the supervising architect, as contemplated in the contract, with the request that he would give an opinion on the question of law arising upon the resolution of Congress authorizing the Secretary of the Treasury to settle the accounts of Beals and Dixon, by allowing them such additional prices for material delivered as they might be justly entitled to:

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Provided, That, in the opinion of the Attorney General, they have a legal claim for such increase of prices; and on the 9th of July, 1866, he rendered an opinion on the legal point involved adverse to the contractors."

In a subsequent part of your letter, you add, "After carefully considering the subject, it appears that the question of law, as applicable to the facts of the case, is not free from doubt. I have therefore not felt, in justice to the contractors, who are involved pecuniarily in the prosecution of the work of erecting the Treasury extension, that I could refuse their request." And you ask me, finally, for "a careful examination and final decision upon the facts as now presented by the complete history of the case."

I find that the opinion of my predecessor, Mr. Speed, to which you refer, bears date on the 9th of July, 1866. After reciting the acts of Congress above quoted, and the provisions of the contracts made between the Secretary of the Treasury and Messrs. Beals and Dixon, of the 10th day of October, 1855, and the 1st day of January, 1857, and the order of the department suspending the work until the 1st day of May, 1861, Mr. Speed enters into an elaborate consideration of the question, whether the contractors have a legal claim upon the United States for an increase of prices under their contracts.

His conclusion is thus stated: "In every view of the case, therefore, I am of the opinion that Beals and Dixon have no legal claim upon the United States for an increase of prices under said contract."

I do not perceive that any facts existed at the time this opinion was given which were not in contemplation of the Attorney General at the time, or that any facts have since transpired which have any bearing upon the question submitted to him.

The only fact which has transpired since that opinion was given is the report of the supervising architect, bearing date February 7, 1867.

That report states the amount of the increase of prices sustained by Beals and Dixon in consequence of the suspen-

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sion of the work; but it had no bearing upon the question before the Attorney General, whether they have a legal claim upon the United States for such increase of prices.

Under these circumstances, I look upon the question as closed.

Whatever my own views might be if the question of a legal claim in favor of the contractors were now for the first time submitted, I do not now feel myself at liberty to re-open the decision which has been made.

The question here is not as to the effect which another department may see fit to give to an opinion delivered from this office, nor as to what effect is to be given by an Attorney General to a question settled by one of his predecessors; but the question for me, under the peculiar circumstances of this case, is, what effect am I to give to *this* opinion of my immediate predecessor? The question now presented to me was referred to him *by Congress*, not alone by the Secretary of the Treasury, and his decision upon that question was to settle the claim.

He performed the duty imposed upon him by Congress, and gave his opinion against the legality of the claim. That decision, in my judgment, settled the question for this department, and for all other departments. It is a decision *of the case*, as well as the question.

By way of illustration, I will suppose that Mr. Speed had given an opinion in favor of the claim of Messrs. Beals and Dixon, and, notwithstanding that opinion, you had again referred the matter to me. Would it, then, be allowable for me to reverse that decision, and hold the contractors not entitled, notwithstanding the very officer to whom the matter was submitted by the act of Congress had decided in their favor?

I do not consider it necessary to go into the inquiry as to how far an Attorney General is concluded by an opinion of one of his predecessors.

I limit myself to the peculiar circumstances *of this case* and of *this* opinion.

In the case of the United States *vs.* Bank of the Metropo-

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lis, (15 Peters, 400,) which involved the question as to the power of a Postmaster General to review the decision of his predecessor, the court say: "The successor of Mr. Barry had the same power, and no more, than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the department. This right in an incumbent, of reviewing a predecessor's decisions, extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given.

It is no longer a case between the correctness of one officer's judgment and that of his successor.

It seems clear enough to me, that this is not a case in which the correctness of the judgment of my predecessor, upon the *very case* and very question referred to him by this resolution, can be now brought into question by me.

I have therefore only to say, that I do not feel at liberty to reconsider the case and the question decided by Mr. Speed.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH McCULLOCH,

Secretary of the Treasury.

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ACQUISITION OF PROPERTY FOR PUBLIC USE.

1. It seems that the United States may acquire private property for public use, in conformity with the laws of a State, passed in the exercise of its own eminent domain power.
2. Property owned by a State and held for public uses is not private property within the meaning of a law of the State providing for compensation to owners of private property appropriated to the use of corporations existing in the State, and such property is not subject to condemnation for the public use of the United States under that law.

ATTORNEY GENERAL'S OFFICE,
June 26, 1867.

SIR: I have had under consideration the abstract and papers received in your letter of January 18, 1867, respecting the title to certain lands situated in Lucas county, Ohio, required for the purpose of establishing range-lights along the Maumee bay.

The tract of land proposed to be acquired for the site of one of these light-houses belongs in part to individuals, but a fraction less than an acre is part of school section sixteen, originally granted by the United States to the State of Ohio for school purposes.

The State of Ohio, in execution of the trust imposed by this grant, has legislated upon the subject of section sixteen, and provided, among other things, for the incorporation of a local board for each section, consisting of three trustees, to whose care and superintendence the section is committed. This board has the power of suing and of being sued, and, under certain limitations, power to make leases of the section, and also to make sales, first authorized by a popular vote of the electors in the surveyed township in which the section may happen to be situated, followed by proceedings in the proper court to effect the sale after appraisement at public auction.

It appears that proceedings have been instituted on behalf of the United States in the probate court of Lucas county, Ohio, wherein this land is situated, which con-

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demned, under the provisions of the Ohio statute on that subject, all the land embraced in this site, for the purpose of establishing a light-house. The Ohio statute which was in force at the time of these proceedings was passed on the 30th of April, 1852, and is entitled "An act to provide for compensation to owners of private property appropriated to the use of corporations."

The 1st section provides, "That all appropriations of private property to the use of any and every corporation now existing, or that may hereafter be created in this State, which may be authorized by law to make such appropriation for the right of way, or for any other purpose which may be within the scope of the legal authority of such corporation, shall be made and conducted in accordance with the provisions of this act."

There is certainly room for doubt, whether, as to the private property of the individuals owning a part of the proposed site, the United States come within the purview of this section so as to authorize proceedings in the name of the United States to condemn such private property. I do not raise any doubt now as to right of the United States to acquire merely private property in a State, in conformity with the laws of a State, passed in the exercise of its own eminent domain power. That such a mode of acquisition by the United States is lawful, and that a title so acquired is valid, has been decided by one of my predecessors. (7 Opinions, 122.) But the doubt which I have upon this branch of the subject is, whether the Ohio statute for the condemnation of private property can be resorted to except by *Ohio corporations.*

The most serious doubt, however, which I have in regard to this subject arises as to the fraction of an acre embraced within the school section sixteen. It seems to me, that that cannot be called *private* property, subject to condemnation for public use, under this statute. The legal title to it I suppose to be in the State of Ohio, and that it is not merely public property of the State, but has already been devoted to a *public use*, that is to say, to the

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purposes of education. In the proceedings it is stated that it belongs to the State of Ohio, and its full value has been assessed in the condemnation proceedings had in this county, and the sum so assessed has been ordered to be paid to the State of Ohio.

It does not appear, in any of the abstracts or statements submitted to me, that there has been any action, legislative or otherwise, on the part of the State of Ohio, specially authorizing these proceedings, or giving consent to this mode of appropriation, or authority to receive the money.

I do not, therefore, feel myself at liberty to give you my opinion in favor of the title thus sought to be acquired.

Two modes occur to me, either of which will obviate the difficulty I have stated. First, an act of the Legislature of the State of Ohio, authorizing the sale and conveyance of this fraction of an acre to the United States upon the payment of the assessed price; or, if that cannot be obtained, secondly, a special act of Congress, in the exercise of the proper eminent domain power of the United States, authorizing a proceeding to condemn all this property to the use of the United States, and providing the means for fixing a just compensation to the respective owners. Such special legislation by Congress has been more than once resorted to for the acquisition of land in a State for the public uses of the United States.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

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THE ALABAMA CERTIFICATES.

1. The term "person," as used in the 9th section of the internal revenue act of July 13, 1866, and as explained in the 44th section of that act, does not include a State.
2. The certificates or receipts issued by the State of Alabama, under authority of the act of its Legislature of February 19, 1867, are not subject to the tax of ten per cent. imposed by the act of Congress of March 25, 1867.

ATTORNEY GENERAL'S OFFICE,
June 28, 1867.

SIR: I have had under consideration the question propounded for my opinion in your letter of April 20th, last, whether certain certificates or receipts, to be issued under a recent act of the Alabama Legislature, will be subject to the tax of ten per cent. imposed by the act of Congress approved March 25, 1867, entitled, "An act to exempt wrapping-paper, &c., from internal revenue tax, and for other purposes."

If the provisions of this act of Congress contain the whole legislation upon this subject, there will be no difficulty in saying that the proposed certificates will not be subject to the tax; but, as will be seen in the sequel, there are other acts of Congress bearing upon the question, which must be taken into account before an answer can be given.

On the 19th of February last, the Legislature of Alabama passed an act authorizing the Governor "to have prepared and issued certificates or receipts, which shall be signed by the Governor and comptroller of public accounts, of denominations not more than $500 nor less than $5, which certificates or receipts shall be substantially in the form following, to wit:

"_____, 186–. No. —.

"Receivable as —— dollars, in payment of all dues to the State. _____,

"_____, *Governor.*

"*Comptroller of Public Accounts.*"

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It is further enacted, that the certificates or receipts so prepared, "upon such paper and with such devices as may be determined upon, shall be numbered and registered in the office of the comptroller of public accounts, and paid into the State treasury upon the warrant of the comptroller, and shall be charged to the State treasurer and entered upon his books as certificate assets, and shall be paid out by him, in all cases where practicable, in payment of claims against the State."

The 3d section provides, "That the faith and credit of the State are hereby pledged for the receipt and redemption of such certificates or receipts as are provided for in this act, and the same shall be, at all times, when presented, received in payment of any taxes and dues to the State; and all tax collectors, and all other public officers, shall receive them in payment for the amount they may call for on their face, in payment of all taxes and dues, of every kind and description, due and owing to the State."

A specimen of one of these proposed certificates has been shown to me. On its face is engraved the form prescribed in the act. On the other side the denomination of "5" is engraved, and these words: "Receivable in payment of taxes and all dues to the State. Issued under the provisions of an act entitled, 'An act to provide for the issuing of certificates or receipts by the State.'" Approved February 19, 1867.

"The faith and credit of the State of Alabama are pledged for the redemption of this certificate or receipt, as provided for in said act."

This specimen is colored green, and, as to size and general appearance, resembles a "greenback."

It seems clear enough that this form or device has been adopted to give to this paper a circulation as currency, and this purpose is admitted by the Governor of Alabama in submitting the question of taxability to your consideration.

All the provisions which I have been able to find in any act of Congress touching this question are the following:

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Section 6 of the amendatory internal revenue act, approved March 3, 1865, (13 Stats, 484.) This section provides, "That every national banking association, State bank, or State banking association, shall pay a tax of ten per centum. on the amount of notes of any State bank, or State banking association, paid out by them after the 1st day of July, 1866."

It is to be observed that the tax imposed by this section is not imposed upon the notes specifically, but is imposed upon the banking institutions which pay them out, at the rate of ten per cent. on the amount of such notes paid out by them after the day named.

Now, if these certificates should be held to come within the description of "notes," as used in that 6th section, it is very clear they would not be comprehended in the other terms of description, not being notes of any State *bank* or State *banking* association: but, if they are notes at all, they are notes of the State, issued by the State.

This 6th section was repealed by the amendatory internal revenue act of July 13, 1866, (U. S. Laws, 39th Cong., 1st. Sess., p. 146.,) which provides, "That every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, *used for circulation*, and paid out by them, after the 1st day of August, 1866, and such tax shall be assessed and paid in such a manner as shall be prescribed by the Commissioner of Internal Revenue."

It will be seen that this last section enlarges the terms of description used in section 6, and embraces the notes of "any person," as well as the notes of a State bank or State banking association, and adds, as a further description, to the term notes, these words: "used for circulation." I have said that such a political body as a State was not embraced in the terms of description used in section 6 of the first act, and could not be called a State bank or State banking association.

A new question arises under section 9th, above quoted, whether the word *person* can be held to include a State.

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The term person, as there used, and without reference to any explanation of the sense in which it is used, I should have no doubt, referred to a natural person, as contradistinguished from such an artificial person as a State bank or State banking association.

In section 44th of this same act of July 13, 1866, it is declared, that "any word or words, in any and all parts of this act, and of all acts to which this act is additional, indicating or referring to person or persons, shall be taken to include partnerships, firms, associations, bodies corporate or politic, or any other party whatsoever, when not otherwise designated, or manifestly incompatible with the intent thereof."

This declaratory clause is not confined to the 9th section, but is made applicable to all the sections of the act in which the term "person" is used. To say that wherever the term person is used, in our internal revenue act, it is to be understood as including a State, would lead to manifest absurdity. I do not know where else besides this section the term person, as used in any of these internal revenue acts, could be made applicable to a State, without manifest incompatibility as well as absurdity. I am, however, by no means prepared to say that the word person, as used in this 9th section, might not be *declared* to include a State without leading to absurdity or incompatibility.

The question before me being one simply of construction, and not of constitutional authority, I am, then, by construction, to say, in reference to this declaratory clause, whether it can be applied to such a body politic as a State. Rejecting other terms of description, which manifestly can have no application to a State, the only language used in this declaratory clause, which requires construction, is, "bodies corporate or politic, or any other party whatsoever, when not otherwise designated, or manifestly incompatible with the intent thereof."

As I have said, the word person, as used in the 9th section, standing alone, properly designated a natural person,

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as contradistinguished from such an artificial person as is called a body politic or corporate.

By general law, without the aid of this declaratory clause, the word person has been held to include an artificial person, as a corporation, as well as a natural person, wherever the subject-matter made such construction proper; and although this word, as used in the 9th section, having reference to the subject-matter, seems to be used in its common sense, as denoting a natural person, yet, as enlarged by the declaratory clause, I am of opinion it includes any other form of corporation besides those named in that 9th section, and that the notes issued for circulation of an insurance corporation would come within its purview.

We come, then, to the very point. Is the term person, as used in the 9th section, and as explained in the 44th section, to be held to include a State? After the most careful consideration I must answer this question in the negative.

A State is, in one sense, a body politic and corporate. In the largest meaning of the word corporation, a State is a corporation, and the United States is a corporation, and they are both bodies politic as well as corporations; but a private corporation is also a body politic and corporate, and is so described in our elementary books.

In what sense, then, or with what meaning, were these terms used in this declaratory act?

Were they meant to apply strictly to that class of bodies politic and corporate usually called private corporations, or were they intended to embrace as well all forms of public corporations, such as States, cities, and other public municipal bodies?

It would, in my judgment, be going further than is allowable to apply the terms bodies corporate or politic even to such a subordinate corporate body as a city. Although such bodies politic and corporate as private corporations are often held to come under the descrip-

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tion of persons, I have never met with a case in which it was held that such a public corporation as a State could be described as a person. Consider that, in this declaratory clause, the legislature undertook to make its meaning clear by precise enumeration, and says, in effect, that the word person, wherever used in the act, "shall be taken to include partnerships, firms, associations, bodies corporate or politic, or any other party whatsoever." The term "bodies corporate or politic" is the only one to include a merely private corporation, and it does not include all artificial persons of that character. Now, if it was the purpose of Congress not only to include such corporations as are not private in their foundation, but to embrace other corporations usually called *public* corporations, certainly that purpose would have been expressed.

And, if it was intended to include a State, why not say a State, without any circumlocution? If it was intended to include a city, why not name it? But here a State or a city is not named, nor is the usual term of description, to wit, a *public* corporation, used to embrace them.

I find myself fortified in the conclusion to which I have arrived, that a State is not included in these terms of description, by a subsequent act of Congress. I refer to the act passed March 26, 1867, entitled "An act to exempt wrapping-paper, &c., from internal tax, and for other purposes." This is the act to which I adverted in the preceding part of this opinion. It clearly enough appears by that act that Congress was of the opinion that neither the 6th section of the act of 1865, nor the 9th section of the act of 1866, and the declaratory clause in the 44th section of the act of 1866, included such a public corporation as a town, city, or other municipal corporation, and therefore specially taxed the notes of such public corporations when paid out after the 1st of May, 1867. Now, if these public corporations, under the provisions of the 6th, 9th, and 44th sections, were already subject to the tax therein imposed, and which had already accrued, why was it found

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necessary to tax them by this section, and to make them liable only upon further issues?

We must therefore conclude, that as to such a public corporation as a city Congress found it necessary to tax its circulating notes by a special enactment. But if a city was not included in the prior legislation, how can it be said that a State was included?

And again, when Congress, by this act of 1867, determined upon taxing the notes issued by a city, why did they not mention a State also, if it was their purpose to tax the circulating notes issued by a State?

The conclusion in my mind is irresistible, that these certificates issued by the State of Alabama, even if we should call them notes within the meaning of the law, are not subject to this ten per cent. tax.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

THE RECONSTRUCTION ACTS.

1. The powers and duties of the military commanders in the districts constituted by the act of March 2, 1867, "to provide for the more efficient government of the rebel States," considered and determined.
2. The jurisdiction of military commissions under that act defined.
3. Summary of the points considered and determined in the former opinion of the Attorney General on this subject.

ATTORNEY GENERAL'S OFFICE,
June 12, 1867.

SIR: On the 24th ultimo, I had the honor to transmit for your consideration my opinion upon some of the questions arising under the reconstruction acts therein referred to. I now proceed to give my opinion on the remaining

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questions upon which the military commanders require instructions.

1. As to the powers and duties of these commanders.

The original act recites in its preamble, that "no legal State governments or adequate protection for life or property exist" in those ten States, and that "it is necessary that peace and good order should be enforced" in those States "until loyal and republican State governments can be legally established."

The 1st and 2d sections divide these States into five military districts, subject to the military authority of the United States, as thereinafter prescribed, and make it the duty of the President to assign from the officers of the army a general officer to the command of each district, and to furnish him with a military force to perform his duties and enforce his authority within his district.

The 3d section declares, "that it shall be the duty of each officer, assigned as aforesaid, to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, and to this end he may allow local civil tribunals to take jurisdiction of and try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose; and all interference, under color of State authority, with the exercise of military authority under this act, shall be null and void."

The 4th section provides, "That all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted; and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed, until it is approved by the officer in command of the district, and the laws and regulations for the government of the army shall not be affected by this act, except in so far as they conflict with its provisions: *Provided*, That no sentence of death

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under the provisions of this act shall be carried into effect without the approval of the President."

The 5th section declares the qualification of voters in all elections, as well to frame the new constitution for each State, as in the elections to be held under the provisional government, until the new State constitution is ratified by Congress, and also fixes the qualifications of the delegates to frame the new constitution.

The 6th section provides, "That until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote under the provisions of the 5th section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment."

The duties devolved upon the commanding general by the supplementary act relate altogether to the registration of voters, and the elections to be held under the provisions of that act. And as to these duties, they are plainly enough expressed in the act, and it is not understood that any question, not heretofore considered in the opinion referred to, has arisen, or is likely to arise, in respect to them.

My attention, therefore, is directed to the powers and duties of the military commanders under the original act.

We see clearly enough that this act contemplates two distinct governments in each of these ten States: the one military, the other civil. The civil government is recognized as existing at the date of the act. The military government is created by the act.

Both are provisional, and both are to continue until the new State constitution is framed and the State is admitted

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to representation in Congress. When that event takes place, both these provisional governments are to cease. In contemplation of this act, this military authority and this civil authority are to be carried on together. The people in these States are made subject to both, and must obey both, in their respective jurisdictions.

There is, then, an imperative necessity to define as clearly as possible the line which separates the two jurisdictions, and the exact scope of the authority of each.

Now, as to the civil authority recognized by the act as the provisional civil government, it covered every department of civil jurisdiction in each of these States.

It had all the characteristics and powers of a State government—legislative, judicial, and executive—and was in the full and lawful exercise of all these powers, except only that it was not entitled to representation as a State of the Union.

This existing government is not set aside; it is recognized more than once by the act. It is not in any one of its departments, or as to any one of its functions, repealed or modified by this act, save only in the qualifications of voters, the qualifications of persons eligible to office, the manner of holding elections, and the mode of framing the constitution of the State. The act does not in any other respect change the provisional government, nor does the act authorize the military authority to change it.

The power of further changing it is reserved, not granted, and it is reserved to Congress, not delegated to the military commander.

Congress was not satisfied with the organic law or constitution under which this civil government was established. *That* constitution was to be changed in only one particular to make it acceptable to Congress, and that was in the matter of the elective franchise. The purpose, the sole object of this act, is to effect that change, and to effect it by the agency of the people of the State, or such of them as are made voters by means of elections provided for in the act, and in the meantime to preserve order and to

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punish offenders, if found necessary, by military commissions.

We are, therefore, not at a loss to know what powers were possessed by the existing civil authority.

The only question is upon the powers conferred on the military authority.

Whatever power is not given to the military remains with the civil government.

We see, first of all, that each of these States is "made subject to the military authority of the United States"—not to the military authority altogether, but with this express limitation—"as hereinafter prescribed."

We must, then, examine what is thereinafter provided, to find the extent and nature of the power granted.

This, then, is what is granted to the military commander: The power or duty "to protect all persons in their rights of person and property; to suppress insurrection, disorder, and violence, and punish, or cause to be punished, all disturbers of the public peace and criminals;" and he may do this by the agency of the criminal courts of the State, or, if necessary, he may have resort to military tribunals.

This comprises all the powers given to the military commander.

Here is a general clause, making it the duty of the military commander to give protection to all persons in their rights of person and property. Considered by itself, and without reference to the context and to other provisions of the act, it is liable, from its generality, to be misunderstood.

What sort of protection is here meant? What violations of the rights of person or of property are here intended? In what manner is this protection to be given? These questions arise at once.

It appears that some of the military commanders have understood this grant of power as all comprehensive, conferring on them the power to remove the executive and judicial officers of the State, and to appoint other officers in their places; to suspend the legislative power of the

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State; to take under their control, by officers appointed by themselves, the collection and disbursement of the revenues of the State; to prohibit the execution of the laws of the State by the agency of its appointed officers and agents; to change the existing laws in matters affecting purely civil and private rights; to suspend or enjoin the execution of the judgments and decrees of the established State courts; to interfere in the ordinary administration of justice in the State courts, by prescribing new qualifications for jurors, and to change, upon the ground of expediency, the existing relations of the parties to contracts, giving protection to one party by violating the rights of the other party.

I feel confident that these military officers, in all they have done, have supposed that they had full warrant for their action. Their education and training have not been of the kind to fit them for the delicate and difficult task of giving construction to such a statute as that now under consideration. They require instruction, and nearly all of them have asked for instruction, to solve their own doubts, and to furnish to them a safe ground for the performance of their duties.

There can be no doubt as to the rule of construction according to which we must interpret this grant of power. It is a grant of power to military authority, over civil rights and citizens, in time of peace. It is a new jurisdiction, never granted before, by which, in certain particulars and for certain purposes, the established principle that the military shall be subordinate to the civil authority is reversed.

The rule of construction to be applied to such a grant of power is thus stated in Dwarris on Statutes, p. 652: "A statute creating a new jurisdiction ought to be construed strictly."

Guided by this rule, and in the light of other rules of construction familiar to every lawyer, especially of those which teach us that, in giving construction to single clauses, we must look to the context and to the whole

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law, that general clauses are to be controlled by particular clauses, and such construction is to be put on a special clause as to make it harmonize with the other parts of the statute so as to avoid repugnancy, I proceed to the construction of this part of the act.

To consider, then, in the first place, the terms of the grant. It is of a power to protect all persons in their rights of person and property. It is not a power to create new rights, but only to protect those which exist and are established by the laws under which these people live. It is a power to preserve, not to abrogate; to sustain the existing frame of social order and civil rule, and not a power to introduce military rule in its place; in effect, it is police power; and the protection here intended is protection of persons and property against violence, unlawful force, and criminal infraction. It is given to meet the contingency recited in the preamble, of a want of "adequate protection for life and property" and the necessity also recited, "that peace and good order should be enforced."

This construction is made more apparent when we look at the immediate context, and see in what mode and by what agency this protection is to be secured. This duty or power of protection is to be performed by the suppression of insurrection, disorder, and violence, and by the punishment, either by the agency of the State courts, or by military commissions, when necessary, of all disturbers of the public peace and criminals; and it is declared, that all interference, under color of State authority, with the exercise of this military authority, shall be null and void.

The next succeeding clause provides for a speedy trial of the offender, forbids the infliction of cruel and unusual punishment, and requires that sentences of these military courts, which involve the liberty or life of the accused, shall have the approval of the commanding general, and, as to a sentence of death, the approval of the President, before execution.

All these special provisions have reference to the preser-

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vation of order and protection against violence and crime. They touch no other department or function of the civil administration, save only its criminal jurisdiction, and even as to that the clear meaning of this act is, that it is not to be interfered with by the military authority, unless when a necessity for such interference may happen to arise.

I see no authority, nor any shadow of authority, for interference with any other courts, or any other jurisdiction, than criminal courts, in the exercise of criminal jurisdiction.

The existing civil authority, in all its other departments —legislative, executive, and judicial—is left untouched.

There is no provision, even under the plea of necessity, to establish, by military authority, courts or tribunals for the trial of civil cases, or for the protection of such civil rights of person or property as come within the cognizance of civil courts, as contradistinguished from criminal courts.

In point of fact, there was no foundation for such a grant of power; for the civil rights act, and the freedmen's bureau act, neither of which is superseded by this act, made ample provision for the protection of all merely civil rights, where the laws or courts of these States might fail to give full, impartial protection.

I find no authority anywhere in this act for the removal by the military commander of the proper officers of a State, either executive or judicial, or the appointment of persons in their places.

Nothing short of an express grant of power would justify the removal or the appointment of such an officer. There is no such grant expressed or even implied. On the contrary, the act clearly enough forbids it. The regular State officials, duly elected and qualified, are entitled to hold their offices. They, too, have rights which the military commander is bound to protect, not authorized to destroy.

We find in the concluding clause of the 6th section of the act that these officials are recognized, and express provision is made to perpetuate them. It is enacted that, "in all elections to any office under such provisional gov-

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ernments, all persons shall be entitled to vote, and none others, who are entitled to vote under the provisions of the 5th section of this act; and no person shall be eligible to any office under such provisional governments who would be disqualified from holding office under the provisions of this act."

This provision not only recognizes all the officers of the provisional governments, but, in case of vacancies, very clearly points out how they are to be filled; and that happens to be in the usual way, by the people, and not by any other agency or any other power, either State or federal, civil or military.

I find it impossible, under the provisions of this act, to comprehend such an official as a governor of one of these States appointed to office by one of these military commanders.

Certainly he is not the governor recognized by the laws of the State, elected by the people in the State, and clothed as such with the chief executive power. Nor is he appointed as a military governor for a State, which has no lawful governor, under the pressure of an existing necessity, to exercise powers at large.

The intention, no doubt, was to appoint him to fill a vacancy occasioned by a military order, and to put him in the place of the removed governor, to execute the functions of the office, as provided by law.

The law takes no cognizance of such an official, and he is clothed with no authority or color of authority.

What is true as to the governor is equally true as to all the other legislative, executive, and judicial officers of the State. If the military commander can oust one from his office, he can oust them all. If he can fill one vacancy, he can fill all vacancies, and thus usurp all civil jurisdiction into his own hands, or the hands of those who hold their appointments from him and subject to his power of removal, and thus frustrate the very right secured to the people by this act. Certainly this act is rigorous enough in the power which it gives. With all its severity, the

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right of electing their own officers is still left with the people, and it must be preserved.

I must not be understood as fixing limits to the power of the military commander in case of an actual insurrection or riot. It may happen that an insurrection in one of these States may be so general and formidable as to require the temporary suspension of all civil government, and the establishment of martial law in its place. And the same thing may be true as to local disorder or riot, in reference to the civil government of the city or place where it breaks out. Whatever power is necessary to meet such emergencies the military commander may properly exercise.

I confine myself to the proper authority of the military commander where peace and order prevail. When peace and order do prevail, it is not allowable to displace the civil officers, and appoint others in their places, under any idea that the military commander can better perform his duties, and carry out the general purposes of the act by the agency of civil officers of his own choice rather than by the lawful incumbents. The act gives him no right to resort to such agency, but does give him the right to have "a sufficient military force" to enable him "to perform his duties and enforce his authority within the district to which he is assigned."

In the suppression of insurrection and riot the military commander is wholly independent of civil authority.

So, too, in the trial and punishment of criminals and offenders, he may supersede the civil jurisdiction.

His power is to be exercised in the special emergencies, and the means are put into his hands by which it is to be exercised, that is to say, "a sufficient military force to enable such officer to perform his duties and enforce his authority," and military tribunals of his own appointment to try and punish offenders. These are strictly military powers, to be executed by military authority, not by the civil authority, or by civil officers appointed by him to perform ordinary civil duties.

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If these emergencies do not happen, if civil order is preserved, and criminals are duly prosecuted by the regular criminal courts, the military power, though present, must remain passive.

Its proper function is to preserve the peace, to act promptly when the peace is broken, and restore order.

When that is done, and the civil authority may again safely resume its functions, the military power again becomes passive, but on guard and watchful.

This, in my judgment, is the whole scope of the military power conferred by this act; and, in arriving at this construction of the act, I have not found it necessary to resort to the strict construction which is allowable.

What has been said indicates my opinion as to any supposed power of the military commander to change or modify the laws in force.

The military commander is made a conservator of the peace, not a legislator. His duties are military duties, executive duties: not legislative duties. He has no authority to enact or declare a new code of laws for the people within his district, under any idea that he can make a better code than the people have made for themselves.

The public policy is not committed to his discretion. The Congress which passed this act undertook, in certain grave particulars, to change these laws; and, these changes being made, the Congress saw no further necessity of change, but were content to leave all the other laws in full force, but subject to this emphatic declaration: that, as to these laws, and such future changes as might be expedient, the question of expediency, and the power to alter, amend, or abolish, was reserved for "the paramount authority of the United States, at any time, to abolish, modify, control, or supersede the same." Where, then, does a military commander find *his* authority "to abolish, modify, control, or supersede" any one of these laws?

The enumeration of the extraordinary powers exercised by the military commanders in some of the districts would extend this opinion to an unreasonable length.

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A few instances must suffice.

In one of these districts, the governor of a State has been deposed under a threat of military force, and another person, called a governor, has been appointed by the military commander to fill his place. Thus presenting the strange spectacle of an official intrusted with the chief power to execute the laws of the State, whose authority is not recognized by the laws he is called upon to execute.

In the same district, the judge of one of the criminal courts of the State has been summarily dealt with.

The act of Congress does give authority to the military commander, in cases of necessity, to transfer the jurisdiction of a criminal court to a military tribunal. That being the specific authority over the criminal courts given by the act, no other authority over them can be lawfully exercised by the military commander.

But, in this instance, the judge has, by military order, been ejected from his office, and a private citizen has been appointed judge in his place by military authority, and is now in the exercise of criminal jurisdiction "over all crimes, misdemeanors, and offences" committed within the territorial jurisdiction of the court.

This military appointee is certainly not authorized to try any one for any offence as a member of a military tribunal, and he has just as little authority to try and punish any offender as a judge of a criminal court of the State.

It happens that this private citizen, thus placed on the bench, is to sit as the sole judge in a criminal court whose jurisdiction extends to cases involving the life of the accused.

If he has any judicial power in any case, he has the same power to take cognizance of capital cases, and to sentence the accused to death, and order his execution. A strange spectacle, where the judge and the criminal may very well "change places;" for if the criminal has unlawfully taken life, so too does the judge. This is the inevitable result, for the only tribunal, the only judges, if they can be called judges, which a military commander

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can constitute and appoint under this act, to inflict the death penalty, is a military court composed of a board, and called in the act a "military commission."

I see no relief for the condemned against the sentence of this agent of the military commander. It is not the sort of court whose sentence of death must be first approved by the commander and finally by the President, for that is allowed only where the sentence is pronounced by a "military commission." Nor is it a sentence pronounced by the rightful court of a State, but by a court and by a judge not clothed with authority under the laws of the State, but constituted by the military authority. As the representative of this military authority, this act forbids interference, "under color of State authority," with the exercise of his functions.

In another one of these districts a military order commands the governor of the State to forbid the reassembling of the legislature, and thus suspends the proper legislative power of the State. In the same district an order has been issued "to relieve the treasurer of the State from the duties, bonds, books, papers, &c., appertaining to his office," and to put an "assistant quartermaster of United States volunteers" in place of the removed treasurer; the duties of which quartermaster-treasurer are thus summed up: He is to make to the headquarters of the district "the same reports and returns required from the treasurer, and a monthly statement of receipts and expenditures; he will pay all warrants for salaries which may be or become due, and legitimate expenditures for the support of the penitentiary, State asylum, and the support of the provisional State government; but no scrip or warrants for outstanding debts of other kind than those specified will be paid without special authority from these headquarters. He will deposit funds in the same manner as though they were those of the United States."

In another of these districts a body of military edicts, issued in general and specials orders regularly numbered, and in occasional circulars, have been promulgated, which

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already begin to assume the dimensions of a code. These military orders modify the existing law in the remedies for the collection of debts, the enforcement of judgments and decrees for the payment of money, staying proceedings instituted, prohibiting in certain cases the right to bring suit, enjoining proceedings on execution for the term of twelve months, giving new liens in certain cases, establishing homestead exemptions, declaring what shall be a legal tender, abolishing in certain cases the remedy by foreign attachment, abolishing bail, "as heretofore authorized," in cases *ex contractu*, but not in "other cases known as actions *ex delicto*," and changing in several particulars the existing laws as to the punishment of crimes, and directing that the crimes referred to "shall be punished by imprisonment at hard labor for a term not exceeding ten years nor less than two years, in the discretion of the court having jurisdiction thereof." One of these general orders, being No. 10 of the series, contains no less than seventeen sections, embodying the various changes and modifications which have been recited.

The question at once arises in the mind of every lawyer, what power or discretion belongs to the court, having jurisdiction of any of these offences, to sentence a criminal to any other or different punishment than that provided by the law which vests him with jurisdiction.

The concluding parapraph of this order, No. 10, is in these words: "Any law or ordinance heretofore in force in North Carolina or South Carolina, inconsistent with the provisions of this general order, are hereby suspended and declared inoperative." Thus announcing, not only a power to suspend the laws, but to declare them generally inoperative, and assuming full powers of legislation by the military authority.

The ground upon which these extraordinary powers are based is thus set forth in military order, No. 1, issued in this district: "The civil government now existing in North Carolina and South Carolina is provisional only, and in all respects subject to the paramount authority of the United

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States, at any time to abolish, modify, control, or supersede the same." Thus far the provisions of the act of Congress are well recited. What follows is in these words: "Local laws and municipal regulations, not inconsistent with the Constitution and laws of the United States, or the proclamations of the President, or with such regulations as are or may be prescribed in the orders of the commanding general, are hereby declared to be in force; and, in conformity therewith, civil officers are hereby authorized to continue the exercise of their proper functions, and will be respected and obeyed by the inhabitants."

This construction of his powers, under the act of Congress, places the military commander on the same footing as the Congress of the United States. It assumes that "the paramount authority of the United States at any time to abolish, modify, control, or supersede," is vested in him as fully as it is reserved to Congress. He deems himself a representative of that paramount authority. He puts himself upon an equality with the law-making power of the Union; the only paramount authority in our government, so far, at least, as the enactment of laws is concerned.

He places himself on higher ground than the President, who is simply an executive officer. He assumes, directly or indirectly, all the authority of the State, legislative, executive, and judicial, and in effect declares, "I am the State."

I regret that I find it necessary to speak so plainly of this assumption of authority.

I repeat what I have heretofore said, that I do not doubt that all these orders have been issued under an honest belief that they were necessary or expedient, and fully warranted by the act of Congress.

There may be evils and mischiefs in the laws which these people have made for themselves, through their own legislative bodies, which require change; but none of these can be so intolerable as the evils and mischiefs which must ensue from the sort of remedy applied.

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One can plainly see what will be the inevitable confusion and disorder which such disturbances of the whole civil policy of the State must produce. If these military edicts are allowed to remain, even during the brief time in which this provisional military government may be in power, the seeds will be sown for such a future harvest of litigation as has never been inflicted upon any other people.

There is, in my opinion, an executive duty to be performed here which cannot safely be avoided or delayed.

For, notwithstanding the paramount authority assumed by these commanders, they are not, even as to their proper executive duties, in any sense, clothed with a paramount authority. They are, at least, subordinate executive officers. They are responsible to the President for the proper execution of their duties, and upon him rests the final responsibility. They are his selected agents. His duty is not all performed by selecting such agents as he deems competent, but the duty remains with him to see to it that they execute their duties faithfully and according to law.

It is true, that this act of Congress only refers to the President in the matter of selecting and appointing these commanders; and in the matter of their powers and duties under the law, the act speaks in terms directly to them; but this does not relieve them from their responsibility to the President, nor does it relieve him from the constitutional obligation imposed upon him to see that all "the laws are faithfully executed."

It can scarcely be necessary to cite authority for so plain a proposition as this. Nevertheless, as we have a recent decision completely in point, I may as well refer to it.

Upon motion made by the State of Mississippi before the Supreme Court of the United States at its late term, for leave to file a bill against the President of the United States to enjoin him against executing the very acts of Congress now under consideration; the opinion of the court upon dismissing that motion, and it seems to have been unanimous, was delivered by the chief justice. I

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make the following quotation from the opinion: "Very different is the duty of the President, in the exercise of the power to see that the laws are faithfully executed, and among those laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and their duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political."

Certain questions have been propounded from one of these military districts touching the construction of the power of the military commander to constitute military tribunals for the trial of offenders, which I will next consider.

Whilst the act does not in terms displace the regular criminal courts of the State, it does give the power to the military commander, when in his judgment a necessity arises, to take the administration of the criminal law into his own hands, and to try and punish offenders by means of military commissions.

In giving construction to this power, we must not forget the recent and authoritative exposition given by the Supreme Court of the United States as to the power of Congress to provide for military tribunals for the trial of citizens in time of peace, and to the emphatic declaration, as to which there was no dissent or difference of opinion among the judges, that such a power is not warranted by the constitution.

A single extract from the opinion of the minority, as delivered by the chief justice, will suffice: "We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists; where peace exists, the laws of peace must prevail. What we do maintain is, that where the nation is involved in

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war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army, or against the public safety."

Limiting myself here simply to the construction of this act of Congress, and to the question in what way it should be executed, I have no hesitation in saying, that nothing short of an absolute or controlling necessity would give any color of authority for arraigning a citizen before a military commission.

A person charged with crime in any of these military districts has rights to be protected, rights the most sacred and inviolable, and among these the right of trial by jury, according to the laws of the land. When a citizen is arraigned before a military commission on a criminal charge he is no longer under the protection of law, nor surrounded with those safeguards which are provided in the Constitution. This act, passed in a time of peace, when all the courts, State and federal, are in the undisturbed exercise of their jurisdiction, authorizes, at the discretion of a military officer, the seizure, trial, and condemnation of the citizen. The accused may be sentenced to death, and the sentence may be executed without a judge. A sentence which forfeits all the property of the accused requires no approval. If it affects the liberty of the accused, it requires the approval of the commanding general; and if it affects his life, it requires the approval of the general and of the President. Military and executive authority rule throughout in the trial, the sentence, and the execution. No *habeas corpus* from any State court can be invoked; for this law declares, that "all interference, under color of State authority, with the exercise of military authority under this act, shall be null and void."

I repeat it, that nothing short of an absolute necessity can give any color of authority to a military commander

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to call into exercise such a power. It is a power the exercise of which may involve him, and every one concerned, in the greatest responsibilities. The occasion for its exercise should be reported at once to the Executive, for such instructions as may be deemed necessary and proper.

Questions have arisen whether, under this power, these military commissions can take cognizance of offences committed before the passage of the act, and whether they can try and punish for acts not made crimes or offences by federal or State law.

I am clearly of opinion that they have no jurisdiction as to either. They can take cognizance of no offence that has not happened after the law took effect. Inasmuch as the tribunal to punish, and the measure or degree of punishment, are established by this act, we must construe it to be prospective, and not retroactive. Otherwise, it would take the character of an *ex post facto* law. Therefore, in the absence of any language which gives the act a retrospect, I do not hesitate to say it cannot apply to past offences.

There is no legislative power given under this military bill to establish a new criminal code. The authority given is to try and punish criminals and offenders, and this proceeds upon the idea that crimes and offences have been committed; but no person can be called a criminal or an offender for doing an act which, when done, was not prohibited by law.

But, as to the measure of punishment, I regret to be obliged to say that it is left altogether to the military authorities, with only this limitation: that the punishment to be inflicted shall not be cruel or unusual.

The military commission may try the accused, fix the measure of punishment, even to the penalty of death, and direct the execution of the sentence.

It is only when the sentence affects the "life or liberty" of the person that it need be approved by the commanding general, and only in cases where it affects the life of the accused that it needs also the approval of the President.

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As to crimes or offences against the laws of the United States, the military authority can take no cognizance of them, nor in any way interfere with the regular administration of justice by the appropriate federal courts.

In the opinion heretofore given upon other questions arising under these laws, I gave at large, for your consideration, the grounds upon which my conclusions were arrived at, intending thereafter to state these conclusions in a concise and clear summary. I now proceed to execute that purpose, which is made especially necessary from the confusion and doubts which have arisen upon that opinion in the public mind, caused, in part, by the errors of the telegraph and the press in its publication, and in part by the inaptitude of the general reader to follow carefully the successive and dependent steps of a protracted legal opinion.

SUMMARY.

Who are entitled to registration?

1. The oath prescribed in the supplemental act defines all the qualifications required, and every person who can take that oath is entitled to have his name entered upon the list of voters.

2. The board of registration have no authority to administer any other oath to the person applying for registration than this prescribed oath, nor to administer any oath to any other person, touching the qualifications of the applicant, or the falsity of the oath so taken by him. The act to guard against falsity in the oath provides that, if false, the person taking it shall be tried and punished for perjury.

No provision is made for challenging the qualifications of the applicant, or entering upon any trial or investigation of his qualifications, either by witnesses or any other form of proof.

3. *As to citizenship and residence.* The applicant for registration must be a citizen of the State and of the United

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States, and must be a resident of a county included in the election district. He may be registered, if he has been such citizen for a period less than twelve months at the time he applies for registration, but he cannot vote at any election unless his citizenship has *then* extended to the full term of one year. As to such a person, the exact length of his citizenship should be noted opposite his name on the list, so that it may appear on the day of election, upon reference to the list, whether the full term has then been accomplished.

4. An unnaturalized person cannot take this oath, but an alien who has been naturalized can take it, and no other proof of naturalization can be required from him.

5. No one who is not twenty-one years of age at the time of registration can take the oath, for he must swear that he has then attained that age.

6. No one who has been disfranchised for participation in any rebellion against the United States, or for felony committed against the laws of any State, or of the United States, can safely take this oath.

The actual participation in a rebellion, or the actual commission of felony, does not amount to disfranchisement. The sort of disfranchisement here meant, is that which is declared by law, passed by competent authority, or which has been fixed upon the criminal by the sentence of the court which tried him for the crime.

No law of the United States has declared the penalty of disfranchisement for participation in rebellion alone. Nor is it known that any such law exists in either of these ten States, except perhaps Virginia, as to which State special instructions will be given.

7. *As to disfranchisement arising from having held office, followed by participation in rebellion.* This is the most important part of the oath, and requires strict attention to arrive at its meaning. I deem it proper to give the exact words. The applicant must swear or affirm as follows:

"That I have never been a member of any State legislature, nor held any executive or judicial office in any

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State, and afterwards engaged in any insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof; that I have never taken an oath as a member of Congress of the United States, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof."

Two elements must concur in order to disqualify a person under these clauses: *first*, the office and official oath to support the Constitution of the United States; *second*, engaging afterwards in rebellion. Both must exist to work disqualification, and must happen in the order of time mentioned.

A person who has held an office, and taken the oath to support the federal Constitution, and has not afterwards engaged in rebellion, is not disqualified.

So, too, a person who has engaged in rebellion, but has not theretofore held an office and taken that oath, is not disqualified.

8. *Officers of the United States.* As to these, the language is without limitation. The person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States, is subject to disqualification.

9. *Military officers* of any State, prior to the rebellion, are not subject to disqualification.

10. Municipal officers, that is to say, officers of incorporated cities, towns, and villages, such as mayors, aldermen, town-council, police, and other city or town officers, are not subject to disqualification.

11. Persons who have, prior to the rebellion, been members of Congress of the United States, or members of a State legislature, are subject to disqualification. But those who have been members of conventions framing or amend-

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ing the constitution of a State, prior to the rebellion, are not subject to disqualification.

12. All the executive or judicial officers of any State, who took an oath to support the Constitution of the United States, are subject to disqualification, and in these I include county officers, as to whom I made a reservation in the opinion heretofore given. After full consideration, I have arrived at the conclusion that they are subject to disqualification, if they were required to take, as a part of their official oath, the oath to support the Constitution of the United States.

13. Persons who exercised mere agencies or employments under State authority are not disqualified, such as commissioners to lay out roads, commissioners of public works, visitors of State institutions, directors of State banks or other State institutions, examiners of banks, notaries public, commissioners to take acknowledgments of deeds, and lawyers.

Engaging in rebellion.

Having specified what offices held by any one prior to the rebellion come within the meaning of the law, it is necessary next to set forth what subsequent conduct fixes upon such person the offence of engaging in rebellion. I repeat, that two things must exist, as to any person, to disqualify him from voting: first, the office held prior to the rebellion; and, afterwards, participation in the rebellion.

14. An act to fix upon a person the offence of engaging in rebellion under this law must be an overt and voluntary act, done with the intent of aiding or furthering the common unlawful purpose.

A person forced into the rebel service by conscription, or under a paramount authority which he could not safely disobey, and who would not have entered such service if left to the free exercise of his own will, cannot be held to be disqualified from voting.

15. Mere acts of charity, where the intent is to relieve

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the wants of the object of such charity, and not done in aid of the cause in which he may have been engaged, do not disqualify. But organized contributions of food and clothing, for the general relief of persons engaged in the rebellion, and not of a merely sanitary character, but contributed to enable them to perform their unlawful object, may be classed with acts which do disqualify.

Forced contributions to the rebel cause, in the form of taxes or military assessments, which a person may be compelled to pay or contribute, do not disqualify. But voluntary contributions to the rebel cause, even such indirect contributions as arise from the voluntary loan of money to rebel authorities, or purchase of bonds or securities created to afford the means of carrying on the rebellion, will work disqualification.

16. All those who, in legislative or other official capacity, were engaged in the furtherance of the common unlawful purpose, where the duties of the office necessarily had relation to the support of the rebellion, such as members of the rebel conventions, congress, and legislatures, diplomatic agents of the rebel confederacy, and other officials whose offices were created for the purpose of more effectually carrying on hostilities, or whose duties appertained to the support of the rebel cause, must be held to be disqualified.

But officers who, during the rebellion, discharged official duties not incident to war, but only such duties as belong to a state of peace, and were necessary to the preservation of order and the administration of law, are not to be considered as thereby engaging in rebellion or disqualified. Disloyal sentiments, opinions, or sympathies would not disqualify; but when a person has, by speech or by writing, incited others to engage in rebellion, he must come under the disqualification.

17. *The duties of the board appointed to superintend the elections.* This board, having the custody of the list of registered voters in the district for which it is constituted, must see that the name of the person offering to vote is found

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upon the registration list, and if such proves to be the fact, it is the duty of the board to receive his vote. They cannot receive the vote of any person whose name is not upon the list, though he may be ready to take the registration oath, and although he may satisfy them that he was unable to have his name registered at the proper time, in consequence of absence, sickness, or other cause. The board cannot enter into any inquiry as to the qualifications of any person whose name is not on the list, or as to the qualifications of any person whose name is on the list.

18. *The mode of voting is provided in the act to be by ballot.* The board will keep a record and poll-book of the election, showing the votes, list of voters, and the persons elected by a plurality of the votes cast at the election, and make returns of these to the commanding general of the district.

19. The board appointed for registration and for superintending the elections must take the oath prescribed by the act of Congress entitled "An act to prescribe an oath of office," approved July 2, 1862.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

The PRESIDENT.

THE DENNISTOUN CASE.

1. It is not the province of the Attorney General to settle a controversy involving matters of fact. He can only give his opinion on questions of law.
2. Where a question of law arises upon facts submitted to the Attorney General, such facts must be agreed and stated as facts established.
3. The Secretary of the Treasury is advised that this case should be allowed to proceed in the circuit court where it is pending.

ATTORNEY GENERAL'S OFFICE,

July 10, 1867.

SIR: I have taken the earliest opportunity to examine the case brought to my attention by your letter of the 18th of April last.

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The Dennistoun Case.

It appears that an action of replevin is now pending in the circuit court of the United States for the southern district of New York, prosecuted by Messrs. Dennistoun & Company, of that city, against Mr. Simeon Draper, general cotton agent of the Treasury Department in New York. The subject-matter of the controversy in this case arises out of sundry parcels of cotton shipped by the agents of the Treasury Department in the State of Georgia to Mr. Draper. This cotton is claimed by Messrs. Dennistoun & Company as the owners thereof.

You request me to advise you whether, in my "judgment of the present and ulterior legal aspects of the case, the Treasury Department ought, as a matter of administrative duty, to proceed in the maintenance of assumed rights of the Government on the course so far successfully pursued, or whether it should make such other disposition of the matter as may be deemed best for the interests of the Government." You accompany your letter with various exhibits, containing a statement of the case as understood by the department, with reports and depositions on the subject transmitted by the agents of the department, affidavits of various parties, as well on behalf of the claims of the Government as of the plaintiffs, Dennistoun & Company. To all these are added opinions and arguments of counsel on both sides, maintaining the respective claims of the parties.

After a careful perusal of all these papers, I find that all the important facts are contested. The law which must govern this case must arise out of actual facts when they are properly established. If it were a part of my duty to find the facts of the case, I could not, with the presentation of the case now made, undertake to perform that duty. The mode in which proof is attempted to be made is irregular, and, as to certain very important points, so defective as to require further investigation and proof.

But, if the case were properly presented upon the facts, it is not within my province to settle a controversy involving matters of fact. I can only give my opinion on ques-

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tions of law. Where a question of law arises upon facts submitted to the Attorney General, such facts must be agreed and stated as facts established. As I have said, there is no such presentation of facts in this case on which I am authorized to act. I cannot, therefore, give you any opinion as to the "present and ulterior legal aspects of the case."

It is, perhaps, proper for me to say, in addition, that the case is so imperfectly prepared upon the facts, that it does not seem to me that any disposition could now safely be made of it, so far as the Government is concerned, other than to allow it to proceed in the court where it is now pending.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

TAXATION OF INDIAN COTTON.

1. The internal revenue system of the United States has not, in any instance or for any purpose, been extended over the Indian country.
2. Cotton raised in the Choctaw nation, by an Indian of that nation, is not liable to taxation, under the internal revenue laws, either while in the Indian country or in transit through any collection district, or in the collection district where it may have been found, or may have been sold.

ATTORNEY GENERAL'S OFFICE,
July 24, 1867.

SIR: I have had under consideration the claim of R. M. Jones, one of the Choctaw tribe of Indians, for refunding money paid by him as a tax on cotton.

This claim was first brought to my attention by your letter of February 23, 1867. I replied to that letter on the 30th of March, 1867, stating my opinion that cotton belonging to a member of the Choctaw nation of Indians, produced by him in the territory of that nation, and found

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beyond that territory, within the United States, is not subject to the tax imposed by the internal revenue acts on all cotton produced within the United States. I then merely gave you the result of my examination of the question, reserving for a more convenient opportunity a statement of the reasons upon which that opinion was founded.

Your letter, now before me, of the 10th instant, with the letter addressed to you by the Commissioner of Internal Revenue of the 9th instant, brings this claim again before me for consideration, and affords me an opportunity for stating the grounds upon which that opinion was based.

The questions for my opinion are thus stated in the letter of the Commissioner:

1. As to the power of Congress, under the Constitution and treaties with the Choctaws, to lay taxes upon the inhabitants and products of the Indian territory within that territory.

2. To lay such taxes upon the inhabitants and products of the Indian territory when the same fall under the conditions of the United States tax laws in the States and Territories of the United States.

3. Whether cotton raised in the territory of the Choctaw nation, by an Indian of that nation, and by him sold in an internal revenue district in a State of the United States, is subject to the tax under the act of June 30, 1864.

4. Whether cotton so raised and found *in transitu* through such a collection district is subject to tax under the act of July 13, 1866.

5. Whether cotton (being otherwise subject to tax) is so subject if produced prior to the passage of the act of June 30, 1864.

The questions which seem to me to be proper for my consideration at this time, upon the case and facts as stated, are contained in the third and fourth questions so propounded by the Commissioner. These two questions may very well be condensed into the following: Whether cotton raised in the Choctaw nation, by an Indian of that nation, can be taxed in any collection district of the United States

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outside of the Choctaw country whilst *in transitu* and in the hands of the original owner, or in any collection district in which it may be sold by the original owner?

Our internal revenue system has not in any instance or for any purpose been extended over the Indian country.

Collection districts have been extended over all the States of the Union and over all the organized Territories. But as to Indian territory held under treaty between the separate tribes and the United States, whether that Indian territory is situated within the limits of a State of this Union or an organized Territory of the Union, or, as is the case with the Choctaw territory, lying outside of any State or any organized Territory of the United States, there is no instance in which it has been laid out into districts for the collection of internal revenue.

It has been suggested, however, that as to the specific article of cotton, there are statutory provisions which make cotton produced on Indian lands subject to federal taxation.

A very careful consideration of these legislative provisions satisfies me that this supposed liability to taxation is without foundation.

The internal revenue act of June 30, 1864, section 94, contains this provision: "Upon the articles, goods, wares, and merchandise hereinafter mentioned, except where otherwise provided, which shall be produced and sold, or be manufactured or made and sold, or be consumed or used by the manufacturer or producer thereof, or removed for consumption, or for delivery to others than agents of the manufacturer or producer within the United States or Territories thereof, there shall be levied, collected, and paid the following duties, to be paid by the producer or manufacturer thereof, that is to say." [The tax or duty to be paid on cotton is provided for in a subsequent clause of this section, as follows:] "On cotton upon which no duty has been levied, collected, or paid, and which is not exempted by law, a duty of two cents per pound, which shall be and remain a lien thereon until said duty shall

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have been paid, in the possession of any person or persons whomsoever."

The 177th section of the same act contains this provision: "Every collector to whom any duty upon cotton shall be paid shall mark the bales or other packages upon which the duty shall have been paid in such a manner as may clearly indicate the payment thereof, and shall give to the owner, or other person having charge of such cotton, a permit for the removal of the same, stating therein the amount and payment of duty, the time and place of payment, the weight and marks upon the bales and packages, so that the same may be fully identified.

When any cotton, the product of the United States, shall arrive at any port of the United States, from any State in insurrection against the Government, the assessor or assistant assessor, shall immediately assess the taxes due thereon, and shall, without delay, return the same to the collector or deputy collector of said district, and the said collector or deputy collector shall demand of the owner, or other person having charge of such cotton, the tax imposed by this act and assessed thereon, unless evidence of previous payment of such tax shall be produced, "under such regulations as the Commissioner of Internal Revenue, by the direction of the Secretary of the Treasury, shall from time to time prescribe."

I do not see any provisions in these sections which apply to cotton raised or produced in the Choctaw country. It is not cotton produced or grown in any State or organized Territory of the United States, or within the bounds of any internal revenue district. Nor does it answer to the description of cotton produced in any State in insurrection against the Government, and arriving from thence at a port of the United States.

It is true, that in one sense cotton grown in the Choctaw country may be said to be "the product of the United States," for in some respects the Choctaw country is within the territorial limits of the United States.

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But, as the phrase is used in this act, it has reference to the States then in insurrection.

Furthermore, the language used in imposing a tax upon cotton necessarily has reference to the liability of the article *at the place of production* and in the hands of the producer. If the cotton is taxable at all, *the lien* for the tax attaches upon it in the hands of the producer, but cannot be levied or collected until some other condition happens, such as consumption, sale, or removal. But if cotton is not *liable* to tax in the hands of the producer, there is no provision of law which makes it taxable in the hands of *a purchaser.*

This is not a tax on sales, but a tax on production, payable upon consumption, removal, or sale. The cotton is *bound* for the tax so soon as it is produced, but the tax is not payable until the conditions happen. Whereas in the case of a tax strictly on sales, there is no lien for the tax and no liability for the tax until a sale is made.

The internal revenue act of the 13th of July 1866, (vol. 14, p. 98,) contains certain provisions in reference to the tax on cotton, which I will now proceed to notice.

It is provided in the first section of this act that "there shall be paid by the producer, owner, or holder, upon all cotton produced within the United States, and upon which no tax has been levied, paid, or collected, a tax of three cents per pound, as hereinafter provided," "and such tax shall be and remain a lien thereon, in possession of any person whomsoever, from the time when this law takes effect, or such cotton is produced, as aforesaid, until the same shall have been paid."

The 2d section provides, "That the aforesaid tax upon cotton shall be levied by the assessor on the producer, owner, or holder thereof, and said tax shall be paid to the collector of internal revenue *within and for the collection district* in which said cotton shall have been produced, and before the same shall have been removed therefrom, except where otherwise provided in this act."

It is further provided in this and subsequent sections,

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that no cotton shall be removed from the place where it is produced, except a permit for the removal be given by the collector of the proper district in which it has been produced; and this permit may be given either upon payment of the tax assessed or the execution of bonds with security for the payment of the tax when the cotton shall reach its place of destination, and that the cotton so removed shall be delivered to the collector upon its arrival at the place of destination, and remain subject to his control until taxes and necessary charges shall be paid. The 5th section of the act prohibits the transportation, by any transportation company, common carrier, or any person whatever, of "any cotton the growth or produce of the United States, from any point in the district in which it shall have been produced," unless accompanied by the permit of the proper collector.

By the 7th section, it is provided, "That it shall be the duty of every person, firm, or corporation, manufacturing cotton for any purpose whatever, in any district where cotton is produced, to return to the assessor or assistant assessor of the district in which such manufacture is carried on a true statement in writing, signed by him, and verified by his oath or affirmation, on or before the tenth day of each month."

All these provisions fortify the conclusion at which I have arrived, that cotton produced in the Choctaw nation does not come within their operation. A tax on cotton produced there, or manufactured there, or sold there, cannot be levied, assessed, or collected, under the provisions of these acts. Nor is there anything in these acts to forbid its removal or sale to any part of the United States. Being a production of the Indian country, by express statutory enactment it is not liable to any impost or transit duty.

There is no lien upon it for any taxes at the place of production, nor is any permit for its removal necessary.

I am clearly satisfied that the omission in the various internal revenue laws to provide for the organization of collection districts over the Indian territory was not fortuitous

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or accidental, and that it was the settled purpose of Congress not to subject the persons or the productions of Indians, existing under their regular tribal associations, to liability for any tax imposed by the acts. If the provisions as to the specific article of cotton apply to Indian territory, I see no reason why all the other forms of tax provided for in these acts are not equally applicable to Indian territory.

We must, consequently, make them subject to taxation in reference to stamps, income, and descents in succession, as well as for other purposes.

The intent of Congress not to include them in any sort of taxation I think is clear enough from the language of the acts themselves. But all other considerations which apply to them equally forbid this idea of federal taxation. Their rights are defined by treaties. They have some of the characteristics of independent sovereignties.

They are in a state of tutelage and protection under the United States. The general laws of the United States, in which they are not mentioned, are never understood to apply to them. Even when these Indians and their territory are situated within the bounds of a State of the Union, they are not subject to State taxation.

In recent cases before the Supreme Court of the United States, at its December term, 1866, speaking of the condition of Indian tribes under treaty with the United States, the court use this language: "The object of the treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians.

In order to accomplish this object, they must be relieved from every species of levy, sale, and forfeiture; from a levy and sale for taxes, as well as the ordinary judicial levy and sale."

Again the court say, in reference to the tribal association of the Shawnees, that "they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by Government of the Union. If under the control of Con-

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gress, from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, 'but until they are clothed with the rights and bound by all the duties of citizens' they enjoy the privilege of total immunity from State taxation." And again "As long as the United States recognize their national character, they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State law."

Such is the well established policy of the United States with regard to the total exemption of the Indian tribes from State taxation. The tenor of all the treaties shows that the idea of subjecting them to taxation by the General Government was never entertained, and certainly hitherto it has never been attempted.

I am therefore clearly of opinion, that the particular cotton in question was not liable to taxation under our internal revenue laws, either while in the Indian country or in transit through any collection district of the United States, or in the collection district where it may have been found or may have been sold.

This opinion covers the actual case. I refrain from giving any opinion as to the power of the United States to levy a federal tax upon the Indian country.

That is an abstract question, and until a case arises which makes it practical, I must abstain from expressing any opinion in regard to it.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

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BROOKE'S CASE.

1. An attorney of record of the claimant in a case prosecuted to judgment against the United States in the Court of Claims has no lien on the judgment, or on the money payable under it, for his fees as such attorney; nor has he any equitable interest in the judgment, or the money payable upon it, which the Government is bound to protect in payment of the judgment
2. A debt settled by judgment in the Court of Claims, and due from the United States, does not come within the purview and operation of the 1st section of the act of February 20, 1853, relative to the assignment of claims against the United States.

ATTORNEY GENERAL'S OFFICE,
July 25, 1867.

SIR: I have examined the case of Mr. Jolliffe, referred here for my opinion, on the following facts and questions:

Francis J. Brooke, by his attorney, John Jolliffe, Esq., prosecuted a claim against the United States in the Court of Claims, upon which judgment was recovered at the December term of said court, 1866, for the sum of $2,080 72.

Mr. Jolliffe subsequently brought a certified copy of the judgment (on the margin of which his name appeared as attorney of record) to the Treasury Department for payment, which, under the rules of the department, was declined during the ninety days allowed for an appeal to the Supreme Court.

Subsequently, Mr. W. S. Huntington, cashier of the First National Bank of Washington, presented a copy of the judgment, with an assignment thereof from Brooke, accompanied by a power of attorney authorizing Huntington to collect the same.

Before payment, Mr. Jolliffe interposed, claiming his fees as attorney, and asserting a lien on the judgment therefor, alleging that the assignment had been made without his knowledge and against his right; and thereupon payment was suspended by direction of the First Comptroller of the Treasury to await the decision of the following questions, viz:

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1. Whether the attorney in this case has a lien upon the judgment, or rather upon the sum recovered, for his fees?

2. Whether the whole sum recovered should be paid to the attorney, to be accounted for with the proper owner of the judgment?

3. If not paid to the attorney, to whom should it be paid?

As to the first question, whether Mr. Jolliffe, as the attorney of record, has a lien on this judgment, or on the money payable under it, for his fees as such attorney?

The Court of Claims, as established by statute, has some peculiar features. It is a court of limited jurisdiction and for the investigation of claims against the United States.

Its officers are compensated by fixed salaries, and not by fees or costs. Its judgments are rendered for the amount found due to the claimant, generally without interest and always without costs.

Under certain rules and regulations established by the court, lawyers are admitted to practice before it. Final judgments obtained in this court are to be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of the judgment, certified by the clerk of the Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court; and such payment is to be a full discharge to the United States touching any of the matters involved in the controversy.

There is no provision anywhere in the acts of Congress relating to this court prescribing the duties or rights of attorneys who may practice therein, except only the proper solicitors of the United States; but authority is given to the court to establish rules of practice therein. Under these rules counsel are admitted to practice in that court, and certain qualifications are required of them; but none of these rules provide for any lien on behalf of an attorney practicing therein for his fees, either upon judgment re-

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covered by his client or upon the money payable on such judgment.

I am not aware that any law of the United States, as to attorneys at law practicing in the courts of the United States, gives them any lien on a judgment recovered for their general fees.

Provision is made by the 2d section of the act of February 26, 1853, by which docket-fees, ranging from $5 to $20, are allowed to the attorney of the successful party, and taxed in the bill of costs. But it is not understood that this provision as to the docket-fees applies to judgments rendered in the Court of Claims.

In England, and in some of the States of the Union, there is a lien in favor of that class of lawyers called attorneys and solicitors, for such fees as are fixed by law or usage, and which, in general, constitute a part of the taxable costs of the case. The grounds upon which such a lien is recognized have, in my judgment, no application in such a court as this Court of Claims, and to the general fees of counsel practicing therein. I do not say that, if Mr. Jolliffe had received the money from the department as the attorney of record, he might not then have retained his fees. But the lien there would arise out of possession of the money, which is quite a different thing from the lien here sought to be established, where the possession of the thing is not in the party who claims the lien.

I therefore answer your first question, that Mr. Jolliffe has no lien either upon the judgment or upon the money which it represents.

I have said that the attorney in this case has no lien for his services; nor has he any equitable interest in the judgment, or the money payable on the judgment, which the department is bound to take notice of and protect in payment of the judgment.

If any question should arise as to this point, I find it settled in an opinion of my predecessor, Mr. Attorney General Bates. Bristol, a citizen of the United States, had a claim against the republic of Costa Rica, which

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was submitted to a joint commission of both governments for adjudication, and was prosecuted to a final award in favor of claimant by Rider, his attorney, under a power authorizing him to prosecute the claim, and to demand, recover, and receive the money. After final award was made, the claimant gave another power of attorney to Foster and Thompson, authorizing them "to collect the instalments as they should become due under the award," and they claimed payment under this power. The amount of the award having been received by the State Department from Costa Rica for the purpose of payment, the question was as to the propriety of the department making payment to the last-named attorneys.

Mr. Bates says, "upon the case stated, I have no doubt at all about the propriety of paying the money to Foster and Thompson. To refuse to do it would be to deny the right of Bristol to choose his own agents and attorneys and to change them at his own pleasure.

"A power coupled with an interest has been sometimes held by the courts not revocable at the pleasure of the grantor. But here there is no apparent interest in Rider. The claim was Bristol's, not Rider's; and there is no suggestion even that Rider had any *legal* interest in it. It is indeed suggested that Rider obtained an *equitable* interest in the claim (not by virtue of any prior right in the subject-matter, but) *by prosecuting it up to the award.* I confess my inability to see how any equitable claim upon the fund can accrue to him on that account. Nothing is said in the statement about fees or compensation; and if we must assume that fees were earned and due, still, in the absence of special contract, such fees do, undoubtedly, constitute a general charge against the client, and not a specific lien upon the subject-matter of the suit.

"The right of Bristol to receive his money by the hands of his chosen attorneys, Foster and Thompson, seems to me a plain legal right. And I think it would be prudent in the department to follow the law, and leave the parties

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to settle their conflicting equities, if any they have, before the judicial tribunals."

The equitable interest of the attorney in the fund recovered being put upon the ground of labor or services bestowed in the prosecution of the claim, it can make no difference whether the claim was prosecuted before a court or a commission; and this question may accordingly be considered disposed of by the opinion above quoted.

There is no pretence of any legal interest acquired by Mr. Jolliffe in virtue of any assignment made prior to the judgment. Indeed, such an assignment, made before the claim had passed into a judgment, and while it yet stood merely on the footing of an unliquidated claim, seems to me forbidden by the act of 1853.

The first assignment brought to my notice which carried any legal interest in the claim was that made after judgment to Mr. Huntington.

The only question remaining for consideration is, whether payment can now be made to Mr. Huntington upon the footing of that assignment and the accompanying power of attorney? The 7th section of the act of Congress establishing the Court of Claims provides as follows: "In all cases of final judgments by the said court, or on appeal by the Supreme Court, where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of said Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court."

A question is made by Mr. Jolliffe, whether a judgment of the Court of Claims is to be put on the footing of a claim against the United States, under the 1st section of the act of February 20, 1853. That section is in these words: "All transfers and assignments hereafter made of any claim upon the United States, or any part or share

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thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

If this judgment is to be considered still in the light of a claim upon the United States, within the meaning of the section just quoted, then no assignment thereof is valid until after a warrant has been issued for its payment.

I am advised that the uniform practice and usage in the Treasury Department has been to recognize assignments and powers of attorney to collect and receive such judgments from the Treasury as valid when made after the recovery of the judgment and before the issuing of a warrant for its payment.

It has been shown that, in the act of Congress which directs the payment of such judgments at the Treasury Department, the money recovered by the judgments in the Court of Claims is considered as a debt due by the United States. It is not described as a "claim," and it ceases to have the character of a claim after it has passed into a judgment. A debt, therefore, settled by judgment, and due from the United States, does not seem to me to come within the purview of the act of 1853. Besides, as has been stated, I am advised that the uniform construction and practice in the Treasury Department is, to recognize assignments and powers of attorney to receive these judgments as valid when made after the judgments are recovered and before the issuing of a warrant.

If the question were more doubtful than it seems to me to be, this uniform usage would settle such a doubt.

Attorney General Taney, in an opinion given on the 22d of March, 1833, (Opinions of Attorneys General, vol. 2, p. 558,) says: "Whenever an act of Congress has, by

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actual decision, or by continued usage and practice, received a construction at the proper department, and that construction has been acted on for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given to it."

I am therefore of opinion, that, if the assignment and power of attorney to Mr. Huntington are in proper form, he is entitled to receive the amount of the judgment. Mr. Jolliffe no doubt has rendered valuable service to his client, for which he is entitled to compensation, but which, in their administrative duties, the officers of the Treasury cannot be required to consider or decide upon. They are only authorized to pay where the legal right to the money is established by a proper assignment and warrant of attorney. And Mr. Jolliffe must be left to such remedy as he may have, either against his client or against the assignee of the judgment.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

PAY OF RETIRED NAVAL OFFICERS.

The construction of the 20th section of the act of July 16, 1862, adopted by the Attorney General in his opinion of May 18, 1867 upon this subject, (*supra*, p. 138,) defended.

ATTORNEY GENERAL'S OFFICE,
August 1, 1867.

SIR: In the opinion communicated to you, under date of the 18th of May last, the result of an examination of the 20th section of the act to equalize the grade of officers, etc., approved July 16, 1862, in *pari materia* with the system of kindred statutes, was substantially to the effect, that

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all officers of the navy whose names were then upon the retired list, who, upon that list, held equal rank, were to have equal pay, notwithstanding the fact that some of them had reached that rank through a promotion which was made without annexing an enhancement of pay at the time, and that some others had assumed their rank on the list expressly on the footing of a rate called furlough pay; and that the reason why this construction was necessary was, that the said 20th section purported to be a rule prescribing the "annual pay of retired naval officers;" that though there were at the time several classes of such officers on the list, distinguished otherwise than by rank, this rule employed no classification but that of rank, and that, consequently, the only means of identifying any officer on the retired list for the purpose of giving effect to this rule was by recognizing his rank, and that, when he was thus identified, the law itself declared, in dollars, what should be his annual pay.

The Attorney General received your request of the 25th ultimo, in which he was reminded of the policy of those provisions of former laws, whereby officers on the retired list of the navy enjoyed a greater or less favor, corresponding to relative merit, as estimated by competent boards of inquiry: some being entitled to a specific annual pay according to the rank held when they were retired; some, in addition to that, enjoying the honor of a promotion on the list, though without enhancement of pay; some, without either the promotion or the specific annual pay referred to, but yet thought worthy to remain officers of the navy, and to receive such pay as an officer on the active list of equal rank receives when he is on furlough.

There seems to be also a class of officers who have been furloughed, but who are not borne on the retired list.

If there are such, they of course are not in question, unless the words used in the act of 1862 aforesaid, "retired naval officers," may include officers not on the retired list, which is rendered improbable by other words in the same sentence.

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To your request for a review of his former opinion, the Attorney General cheerfully responded, but, under the urgency of other engagements, he has remitted that duty to the interval in which his place is occupied by the undersigned.

The act of Congress, of which the true interpretation is under inquiry, went into effect on the 16th of July, 1862, a period of nearly five years since, during which, until recently, the construction which has been given by this office has been actually administered in substance by the disbursing and accounting officers. I observe, also, that in the official Register of the Navy, the pay list, promulgated under your authority, likewise omits all *criteria* but rank for ascertaining the pay of a retired naval officer. These important considerations would not sustain a construction which was demonstrably wrong. But, if so much as a real doubt be conceded, it is obviously to be regretted that its solution was not more opportunely prosecuted.

It is to be observed, also, that all officers who, in the judgment of the board and of the President, were unworthy of official confidence and public favor, have, from time to time, been excluded entirely from the navy; the reserved list being presumably composed of persons whose professional education and standing are deserving the respect, and available for the benefit, of the Government, though in different degrees, depending partly on the personal merit of the officer, partly on opportunity and exigency, partly on their relative numbers, partly on public economy. The policy, then, of blending or of sharpening the discriminations is, in great part, a policy of circumstances. If, as you seem to suggest, a "presumption" of the good policy of the discriminations contained in the earlier acts imparts force to them against the principle of equilization deduced from the later act, the like presumption arises now to antagonize it; the more truly on considering that the discrimination which might be expedient at one time, and must be presumed to have been so, is not at all inconsistent with the opposite and equally obligatory

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presumption at another time, in a question of the policy of Congress on this subject; in which a fluctuation in important particulars is manifest, on comparing the legislation of different times, especially that between the years 1854 and 1858.

I do not view these acts as crossing each other from opposite directions, but distinctly assume that they are all in *pari materia*, and that a policy deducible from them as a whole would operate with great energy on any particular provision. But such a policy could be admissible as a guide only when it was susceptible of distinct elimination as a principle of established consistency.

If the system of laws in hand develops on this point any settled policy, I think it can be traced no further than to discriminate betweeen officers fit to remain in the navy and officers who are not fit. Here the policy is clear. But the method of adjusting governmental recognition to just gradations of personal merit among the former has not frequently changed, but must, I think, be always considerably under the influence of circumstances. Before the war of the rebellion, during its continuance, and since its termination, mark occasions in which all circumstances operative on such a policy present extreme contrasts.

We might expect the legislative will, at the three periods, to assume forms of corresponding contrast. And such indeed was the fact. At the present time, the 9th section of the act of March 2 last imports the policy of restricting in future the benefits of promotion for mere seniority on the retired list. In the year 1862, circumstances may have rendered it expedient to favor, as far as possible, all persons of a class of limited number and special training to meet the extraordinary expansion of the naval service—a policy doubtless perfectly consistent with the opposite policy, again, which occasioned so much animadversion in 1855. These illustrations are wholly in deference to the point of controlling presumptions, as instruments of interpretation of the legislative will, which you offer for the attention of the Attorney General.

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Now, in July, 1862, a law of general scope in the navy was passed, in which, though an important section was devoted to retired naval officers as a class at large, nothing was anywhere contained referring to the discriminations which had hitherto existed; and the question is, whether those discriminations were intentionally ignored?

In previous acts they were always expressed. They were reduced in the act of August 3, 1861, by simply omitting provision for continuing the class on "leave pay," etc. The words in question are, "the annual pay of retired naval officers shall be as follows, viz," etc. Who is a retired naval officer? The answer must be, "Every officer of the navy whose name is on the retired list." If not every one, then it is not any one; for "retired naval officers" includes any one as certainly as it includes any other one, and it must include somebody.

The section, then, includes the whole of them. Still their annual pay might be different. It might be more for those of higher rank and less for those of lower; and it might be higher or lower to officers of equal rank upon some criterion other than that of rank.

The point now is, by what criterion was the paymaster to know how much to pay a particular retired naval officer? The act must speak, or he cannot know. What, then, does the act say? It says, absolutely and arbitrarily, that if the officer in question is an admiral he shall have $2,000; if he is a commodore, he shall have $1,800; and if he is a captain, he shall have $1,600.

A is a commodore, so is B; but A was a captain when he retired; whereas B was a commodore when he went upon the list; so was C, but he was put on the footing of furlough pay.

Here are three commodores. The phrase, "a commodore," is the same thing as the phrase, "any person who is a commodore."

If the paymaster gives C only furlough pay, *although* he is a commodore, gives B but $1,600 because he *was* a captain, and gives A $1,800 because he *is* a commodore, the

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paymaster is obliged to read the law as if it had been written "certain persons who are commodores, $1,800;" "certain persons who have been captains, $1,600," etc. Such a liberty with the studied words of an act of Congress would hardly derive adequate countenance from a policy of indisputable prominence and of the most unbroken constancy.

These views govern me, without hesitation, in offering again the opinion of Mr. Attorney General Stanbery, that the administrative practice under this law could not justifiably be disturbed upon any grounds which have been brought to his attention. This course was taken, in what appears to me to have been a stronger case against it, by Mr. Attorney General Taney, in the case of Commodore Rogers, in which that eminent judge thus expressed the principle, (2 Opinions, 558:) "Whenever an act of Congress has, by actual decision, or by continued usage and practice, received a construction at the proper department, and that construction has been acted on for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given to it."

I am, sir, very respectfully,

Your obedient servant,

JOHN M. BINCKLEY,

Acting Attorney General.

Hon. GIDEON WELLES,

Secretary of the Navy.

BALLARD'S CASE.

Removal of Governor Ballard, of Idaho.

ATTORNEY GENERAL'S OFFICE,

July 30, 1867.

SIR: With your letter of the 8th of May last the Attorney General received an abstract of the views of the examiner of claims in your department, respecting the question

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of vacancy in the cases of the governorship of Idaho and the office of secretary of Colorado, with a request for his opinion as to the correctness of the conclusions therein expressed. A pressure of other public business having cast this, with other matters, upon the interval during which the duties of this office have devolved upon the undersigned, I now learn that your department desires an immediate result of the reference.

I have the honor to state, that I have considered the views of Mr. Smith in his report, which I herewith return, and find no reason to differ from his conclusions of law, excepting that, if, after the constructive removal and up to the present time, (as I understand is the fact.) Governor Ballard continues to perform the gubernatorial functions, and his action as governor has, by official communication, payment of salary, and the like, been recognized by the Executive, the unqualified vacancy found by Mr. Smith does not, in my opinion, exist, and a "suspension," upon showing of cause, would, under the office tenure act, be the proper recourse for introducing a more satisfactory incumbent.

If the fact is otherwise, however, and the secretary of the Territory is acting as governor, or if the action of Governor Ballard has not been recognized as official, though he has continued to act as governor, then I think the will of the President, as deduced from his nominating a successor on the 2d of January, 1867, for the removal of Governor Ballard, under the terms of the organic act, has been continuously operative and is effectual, because a change of his pleasure could not in that case be deduced from a subsequent recognition of the officer.

I am, sir, very respectfully,

Your obedient servant,

JOHN M. BINCKLEY,

Acting Attorney General.

Hon. WM. H. SEWARD,

Secretary of State.

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ACCEPTANCE OF A PROMOTION.

The acceptance of a promotion is not necessary to consummate the appointment of an officer in the naval service to a higher grade.

ATTORNEY GENERAL'S OFFICE,
August 1, 1867.

SIR: Under date of the 18th of December last, the Attorney General was consulted upon the question thus stated in your communication:

"An appointment, promoting an officer of the navy from the grade which he held to the next higher grade, was transmitted to him by the department, but he died without having received it, and the accounting officers object to crediting him in his account with the pay of the higher grade, on the ground, as it is understood, that acceptance by the officer was necessary to consummate the appointment."

It is a general principle of office, that a person cannot be made an incumbent without his consent, and, of course, this he must manifest by some adequate token of his intention.

Hence, a formal acceptance is the evidence which, in the public service generally, it has been customary to require. But though this requirement, as I assume, applies in the naval service alike to appointments from civil life and to promotions on the list of commissioned officers, yet it must be obvious that the regulation which requires it in the latter case is very unlike the legal principle which makes it essential in the former; for the acceptance of a promotion does not, as the acceptance of an original appointment does, invest an unofficial person with official character. It exalts his rank alone. If it devolves upon him official duties which were inaccessible to him before, it was not from defect of official responsibility on his part that the higher duties could not have been demanded of him by the Gov-

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ernment, but rather because the Government had chosen to vest to that extent in his superior officers the privilege of performing such higher duties. As a commissioned officer of the navy, he had already bound himself to obey all lawful orders of his superiors, and no accession of dignity to his rank could augment this obligation. The acceptance of a promotion, then, is not the act of accepting an office, in the sense in which that phrase is used to denote the assumption of official responsibility.

In as far as his acceptance of the promotion bears any analogy to the acceptance *per se* of an office, he may be said to have accepted all promotions to which he might attain when he entered into the naval service under his first commission; for, clearly, he thereupon acquired a right to them whenever it became the duty of the Government to bestow them.

On the other hand, while a promoted officer may not, and in some situations certainly could not, decline the performance of duties of corresponding grade, it is plain that he might decline the rank, with its honors and emoluments. But, in doing so, it is clear that his action would resemble the refusal of an unofficial person to assume an official trust much less than it would the voluntary waiver or renunciation of a vested right; in a word, it would in substance be less of a declination than a resignation.

With such views of the matter, I may add, without hesitation, that when the question, whether or not a promotion took legal effect must, from the circumstances, be solved by presumption; the presumption that the promotion of an officer of the United States navy would have been accepted by him, had he lived to receive it, is conclusive in law, not only upon the considerations expressed, but upon the further reflection, that a man is safely presumed to accept a profit, an advantage; and so clearly are the honor and emolument of a higher grade in naval or military service a benefit, that in all countries a suspen-

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sion of promotion is, independently of any particular circumstances, a customary punishment in the sentences of courts-martial.

I am, sir, very respectfully,
Your obedient servant,
JOHN M. BINCKLEY,
Acting Attorney General.

Hon. GIDEON WELLES,
Secretary of the Navy.

THE ROCK ISLAND BRIDGE.

The act of March 2, 1867, making appropriation for the construction of a bridge at Rock Island, requires that the Rock Island and Pacific Railroad Company shall agree to pay, and shall secure the payment of, half the cost of the erection of the projected bridge over the west or main channel, and half the expenses of keeping the same in repair. The other portions of the work, viz, the construction of a new track across the island, and the building of a bridge, if necessary, over the east channel of the river, are left subject to further legislative provision.

ATTORNEY GENERAL'S OFFICE,
September 11, 1867.

SIR: I have the honor to acknowledge the receipt of your letter of the 26th ultimo, enclosing a communication from the Hon. B. C. Cook, of Illinois, relative to the construction of the act of March 2, 1867, making appropriation for the erection of a bridge at Rock Island, and requesting an opinion on this subject.

The appropriation referred to is in the following terms: "For the erection of a bridge at Rock Island, Illinois, as recommended by the Chief of Ordnance, $200,000: *Provided*, That the ownership of said bridge shall be and remain in the United States, and the Rock Island and Pacific Railroad Company shall have the right of way over said bridge, for all purposes of transit across the island and river, upon the condition that the said company shall, before any money is expended by the Govern-

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ment, agree to pay, and shall secure to the United States, first, half the cost of said bridge; and, second, half the expenses of keeping said bridge in repair; and, upon guaranteeing said conditions to the satisfaction of the Secretary of War, by contract or otherwise, the said company shall have the free use of said bridge for purposes of transit, but without any claim to ownership thereof."

The question suggested by Mr. Cook is, whether it will "be deemed a compliance with the law for the company to guaranty the payment of half the cost of the bridge connecting the island of Rock island with the cities of Davenport and Rock Island, thus allowing the company for half the cost of the bridge between the island and Rock Island, which is (he states) a small sum in comparison with the cost of the structure between the island and Davenport."

By the 1st section of the act of June 27, 1866, chap. 141, entitled "An act making further provisions for the establishment of an armory and arsenal of construction, deposit, and repair, on Rock island, in the State of Illinois," the Secretary of War is authorized to "change, fix, and establish the position of the railroad across Rock island, and the bridge across the Mississippi river at and on the island of Rock island, so as best to accord with the purposes of the Government in its occupancy of said island," etc., to effect which he is also authorized to grant a permanent location and right of way on and across said island, with such quantity of land as may be necessary therefor; the said grant and change to be made on such terms and conditions, previously arranged between the Secretary of War and the companies and parties in interest, as will best secure the purposes of the Government in occupying the island.

The 2d section of same act authorizes the Secretary of War to grant to the companies and parties in interest "such other aid, pecuniary or otherwise, toward effecting the change in the present location of their road and bridge, and establishing thereon a wagon road for the use of the

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Government of the United States, to connect said island with the cities of Davenport and Rock Island," etc., as may be adjudged to be fair and equitable by the board of commissioners authorized under the act of April 19, 1864, entitled, 'An act in addition to an act for the establishment of certain arsenals,' and may be approved by him."

These provisions, it is plain, empower the Secretary of War to change not only the location of the railroad across the island, but also the position of the railroad bridges on either side of the island; and they doubtless authorize him to enter into an arrangement or agreement with the company for effectuating such change, and establishing on the said railroad and bridges a wagon road, "to connect the island with the cities of Davenport and Rock Island," (which are on opposite sides of the river,) upon terms deemed fair and equitable by the board of commissioners mentioned in the act, and approved by the Secretary himself. Such arrangement might as properly embrace the erection of bridges from either side of the island as the construction of the railroad across the island, should their erection be made necessary by the change in the location of the road.

It appears that the board of commissioners above referred to, in a report upon the matter of the railroad and bridge across Rock island and the Mississippi river, under date of February 2, 1867, adopted and recommended the following propositions, submitted by the Chicago, Rock Island, and Pacific Railroad Company, as to the kind of wagon road that should be established, and the amount and kind of aid that should fairly and equitably be granted towards effecting that object, with the further condition, that the Government shall have the right to connect with the track of the company such side tracks as may be desired for the use of the United States, and at such points as the Ordnance Department may select, viz:

"The Government to build, over the *main channel* of the river, an iron draw-bridge, in accordance with the conditions prescribed in the act of Congress of July 25, 1866,

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chap. 246, entitled 'An act to authorize the construction of certain bridges, and to establish them as post roads;' the frame to be of proper breadth for a double track; the wagon-way to be planked high enough to leave the lower chord for a railroad track; the Government to give the company the right of way over this bridge and across the island, upon the payment of half the cost of the superstructure of the bridge; the bridge to be built with due regard to economy, having reference to strength and durability; the company to have five years from January 1, 1867, in which to connect with the new bridge, and to remove its present track across the island, and the old bridge and piers from the main channel; the company to open wagon ways, for the use of the Government, through their present embankment on the island, and remove, as far as practicable, present obstructions to wagon traffic between the island and city of Rock Island."

It also appears that the Chief of Ordnance, Brevet Major General A. B. Dyer, in a report to the Secretary of War, dated February 8, 1867, approved the foregoing recommendation of the commission respecting "the location of the railroad across the island and the bridge across the Mississippi," the "granting of a permanent right of way across the island," and the "kind and character of the bridge to be erected," etc.

The only bridge which, it would seem, is referred to by the commission, whose recommendation the Chief of Ordnance adopted and made his own, is a bridge contemplated to be built over the main channel of the river. Now, the appropriation is "for the erection of a bridge at Rock Island, *as recommended by the Chief of Ordnance;*" and it is understood that the recommendation of that officer which is here alluded to is the one just above mentioned.

It thus appears that the appropriation is applicable to the construction of a bridge over the main channel alone.

Under the act of June 27, 1866, the Secretary of War may, as has been already observed, enter into an agreement with the company, having for its object the erection of bridges

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on both sides of the island, as also the construction of a new track across the island, where made necessary by the proposed change in the present location of the railroad.

But an appropriation, which is by law specially limited to the accomplishment of one part of this work, cannot be diverted to the aid of another and different part. The appropriation for the erection of a bridge over the main channel of the river, (which is on the west side of the island,) must accordingly be confined to that portion of the work, and cannot be applied to the construction of the road across the island, or to building a bridge over that part of the river which bounds the east side of the island.

The conditions imposed upon the Rock Island and Pacific Railroad Company for the right of way over this bridge, by the terms of the act making appropriation for its erection, are, that the company shall, before any money is expended by the Government, agree to pay, and shall secure, to the United States, first, *half the cost of said bridge;* second, *half the expenses of keeping said bridge in repair.* And it is obvious that the guaranty mentioned in the question suggested by Mr. Cook would not amount to a full performance of these conditions, or an entire compliance with the said act.

The law plainly requires of the company that it shall agree to pay, and shall secure the payment of, half the cost of the erection of the projected bridge over the west or *main channel*, and half the expenses of keeping the same in repair; and the other portions of the contemplated work, viz, the construction of a new track across the island, and the building of a bridge, if necessary, over the east channel of the river, are left subject to future legislative provision.

The enclosure received with your letter is herewith returned.

I am, sir, very respectfully,

Your obedient servant,

JOHN M. BINCKLEY,

Acting Attorney General.

General U. S. GRANT,

Secretary of War ad interim.

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APPROPRIATIONS FOR MIAMI INDIANS.

In the administration of the fund appropriated by the act of March 2, 1867, for the Indiana Miamies, the Indians named in the list referred to in the amendment to the treaty of June 5, 1854, between the United States and the Miami Indians, and their successors and representatives, as provided for in the amendment, are the sole beneficiaries.

ATTORNEY GENERAL'S OFFICE,
September 20, 1867.

SIR: The acting Secretary of the Interior, under date of July 10, 1867, submits for my opinion a question arising under the treaty between the United States and the Miami Indians, of the 5th of June, 1854, and the amendments made in the Senate thereto.

The question arises under the act of March 2, 1867, making appropriations for the current and contingent expenses of the Indian department, etc. By one clause of that act there is appropriated to the Miamies of Indiana, "for interest on $221,257 86 uninvested, at five *per centum*, per Senate amendment to IVth article treaty 5th June, 1854, $11,062 89." Section 5th of the same act is as follows: "That the sum hereinbefore appropriated to the Miamies of Indiana, or which shall hereafter be appropriated to them, shall only be paid to such persons as may be, upon the opinion of the Attorney General, legally entitled to the same, under the provisions of the treaty with said Indians of June 5, 1854, and Senate amendments thereto, regardless of any subsequent legislation."

In order to a full understanding of the question presented for my consideration, I deem it proper to refer to the provisions of some treaties with the Miami Indians, and of some joint resolutions of Congress concerning the Miami Indians, all earlier in date than the treaty hereinbefore referred to.

By a treaty concluded near the mouth of the Mississinewa, upon the Wabash, in the State of Indiana, October 23, 1826, (7 Stats. at Large, p. 300,) the United States,

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among other things, agreed (article IV) to pay to the Miami tribe of Indians a permanent annuity of $25,000 as long as they should exist together as a tribe.

By a subsequent treaty, made at the forks of the Wabash, in the same State, November 6, 1838, (7 Stats. at Large, p. 569,) the United States stipulated "to possess the Miami tribe of Indians of, and guaranty them forever, a country west of the Mississippi river, to remove to and settle on, when the said tribe may be disposed to emigrate from their present country," etc.; and provision is also made (article XIV) for paying to John B. Richardville, the principal chief of said tribe, and his family, (he being declared "very old and infirm, and not well able to endure the fatigue of a long journey,") the "proportion of the annuity of said tribe which their number shall indicate to be due them, at Fort Wayne, whenever the said tribe shall emigrate to the country to be assigned them west as a future residence."

By a still later treaty, concluded at the same place, November 28, 1840, the Miami tribe of Indians agreed to remove to the country assigned them west of the Mississippi within five years from that date, etc.; and it was stipulated (article V) that the United States should pay to the family of their deceased war chief, Francis Godfrey, "their just proportion of the annuities of said tribe, at Fort Wayne, from and after the time the tribe shall emigrate to the country assigned to them west of the Mississippi;" and a similar provision (article VII) was also made for Me-shing-go-me-sia and his brothers.

A joint resolution "for the benefit of Francei Slocum and her children and grand-children, of the Miami tribe of Indians," approved March 3, 1845, enacts, "That the portions or shares of annuities or other moneys which are now, or may hereafter become, payable to the Miami tribe of Indians, due to the following-named persons, members of the said tribe of Indians, shall be hereafter and forever payable to them and their descendants, at Fort Wayne or Peru, or such other place in the State of Indiana as the

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Secretary of War shall direct, viz: [Here follow the names of twenty-one Indians.] That if the aforesaid Indians, their descendants, or any part thereof, shall hereafter remove to the country west of the Mississippi river assigned to the Miami tribe of Indians, then, and in such case, the portions or shares of annuities or other moneys payable to said tribe shall be paid to such persons so removing at the place of payment of annuities to said tribe of Indians."

A subsequent resolution, approved May 1, 1850, extends the provisions of the foregoing joint resolution to twelve more Indians of the same tribe, their families and descendants, all residents of the State of Indiana.

Payments having been made at Fort Wayne and Peru to the individual Indians or families designated in these resolutions, and who were not residing with their tribe west of the Mississippi, the principal chief of the emigrated Miamies complained to the proper department of the Government, alleging that all the annuity money should be paid to the tribe as a tribe, and that any money paid to these particular individuals or families was improperly withheld from the tribe. Accordingly, the Secretary of the Interior, in a letter dated February 11, 1854, referred the subject to Attorney General Cushing for his opinion, and the question was, Whether the resolutions of Congress, directing the payments to certain of the Miami Indians, residing within the State of Indiana, were in contravention of the treaty stipulations then existing.

Attorney General Cushing, in an opinion dated May 4, 1854, held that these resolutions were not in contravention of the treaty stipulations between the United States and the Miami Indians, (6 Opinions, p. 440.) He says:

"In the treaties of 1838 and 1840, the intent is manifest that those of the Miami Indians who did not remove to the new habitation assigned to the tribe should nevertheless receive their shares and proportions of the moneys and annuities engaged to the tribe.

"The resolutions of Congress of 1845 and 1850 did nothing more than carry out the intent and spirit of the

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treaties. These Indians are dependents, wards, and pupils, under the guardianship and protection of the Government of the United States. (Cherokee Nation *vs.* Georgia, 5 Pet., 17.) The resolutions of 1845 and 1850 have ordered a distribution, as to the Indians residing in Indiana, *per capita*, or by families, in proportion of their numbers to those of the tribe residing west of the river Mississippi, to which non-residence the Miami tribe were consenting by the treaties of 1838 and 1840, and are consenting. * * * The political action of Congress, in directing how the annuities to the Miami Indians shall be distributed, ought, in my opinion, to continue to be obeyed by the department."

The foregoing presents the condition of things which existed just before the conclusion of the treaty of 5th June, 1854, as respects the payment or distribution of the annuities engaged to the Miami tribe of Indians under former treaties.

It will be seen that two descriptions of Indians then participated in these annuities, namely: 1st, the Miamies who had emigrated to the west, and who, still preserving the tribal organization, constituted the Miami tribe proper; 2d, certain individuals or families of Miami blood, who did not emigrate with, or had separated from, the tribe, and remained in Indiana.

The latter class embraced those who, under the treaties and resolutions above cited, were authorized to receive their proportions of the annuities of the tribe at Fort Wayne and other points in that State.

We come now to the treaty of 1854, and the Senate amendments thereto, which are more immediately connected with the question under consideration, to wit, What persons are entitled thereunder to receive the money appropriated by the act of March 2, 1867.

This treaty was made at Washington, District of Columbia, with five delegates, representing the Miami tribe of Indians, who were duly authorized thereunto by said tribe; five other Miamies, residents of the State of Indiana, "being

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present, and assenting, approving, and agreeing to and confirming" the same. (10 Stats. at Large, p. 1093.)

By the first article the Miami tribe cede to the United States all the tract of country which had been set apart and assigned to them west of the Mississippi river under the provisions of the treaty of 1840, reserving a certain portion thereof for homes and schools.

The second article relates to the survey and disposition of the ceded and reserved lands, the sale of the reserves, etc.

The third article provides for payment for the said cession, and further, that "no part of the moneys in this or the preceding article mentioned shall ever be appropriated or paid to the persons, families, or bands, who by the XIVth article of the treaty of November 6, 1838, by the Vth and IIVth articles of the treaty of November 28, 1840, or by virtue of two resolutions of Congress, approved March 3, 1845, and May 1, 1850, or otherwise, are permitted to draw, or have drawn, in the State of Indiana, their proportion of the annuities of the Miami tribe."

By the IVth article, the said Miami Indians "relinquish and forever absolve the United States from the payment of the permanent annuity of $25,000 stipulated in the IVth article of the treaty of October 23, 1826, etc., and they also release and discharge the United States from all claims or damages on account of the non-fulfilment of the stipulations of any former treaty, etc.; and, in consideration of the relinquishments and releases aforesaid, the United States agree to pay to the said Miami Indians the sum of $421,438 68, in manner as follows, viz: $190,434 68 to the Miami Indians residing on the ceded land, and $231,004 00 to the Miami Indians in the State of Indiana, to be paid under the direction of the President, and in such manner and for such objects as he may prescribe, in six equal annual instalments, etc.: *Provided, however*, That if the Miami Indians of the State of Indiana desire it, and notify the Secretary of the Interior of that fact, he will cause the said sum of $231,004 00 to be invested for them in safe

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stocks, and pay over annually to said Indians the interest arising from such investment, and the said Miami Indians now present from the State of Indiana agree to take the opinion of their people on their return home, and advise the department without delay."

By this article it was also agreed, that the remaining instalments of a certain limited annuity of $12,500, stipulated to be paid by the treaty of 1840, should thereafter be divided and paid as follows: To the Indiana Miamies $6,863 64 and to the Miamies of the west, $5,636 36 per annum, etc.; and by the fifth article the permanent annuity of $25,000 before mentioned, which was thereby authorized to be paid for the years 1854 and 1855 and no longer, was to be divided between the eastern and western Miamies in the same proportion as the limited annuity aforesaid. The remaining articles of the treaty are unimportant.

The Senate, on the 4th of August, 1854, advised and consented to the ratification of this treaty, with an amendment, whereby the proviso to the fourth article, as above set forth, was to be stricken out, and the following words inserted in lieu thereof:

"The sum of $231,004 00, hereby stipulated to be paid to the Miami Indians of Indiana, shall be held by the United States for said last-named Indians, and by the Government invested as the President may direct, at an interest of five per cent. per annum, and which interest shall be paid annually for the period of twenty-five years to the said Miami Indians of Indiana, and at the expiration of that time, or sooner, if required by them and approved by the President, the principal sum to be paid in full, the United States being directly responsible therefor: said investment to be made, and the interest thereon to commence accruing, the 1st day of July, 1855, and then to continue: *Provided*, That no persons other than those embraced in the corrected list agreed upon by the Miamies of Indiana, in the presence of the Commissioner of Indian Affairs, in

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June, 1854, comprising three hundred and two names as Miami Indians of Indiana, and the increase of the families of the persons embraced in said corrected list, shall be recipients of the payments, annuities, commutation moneys, and interest hereby stipulated to be paid to the Miami Indians of Indiana, unless other persons shall be added to said list by the consent of the said Miami Indians of Indiana, obtained in council, according to the custom of the Miami tribe of Indians."

[Here follows another proviso deducting $9,746 14 from the said sum of $231,004 00, and directing payment thereof to certain Miami Indians of Indiana, there named; thus reducing the principal sum on which interest was to be paid to $221,257 86, being the same amount on which a year's interest at five per cent. is appropriated by the act of March 2, 1867, above cited. The amendment then proceeds:]

"The Miami Indians of Indiana being now represented in Washington by a fully authorized deputation, and having requested the foregoing amendments, the same are binding on them; but these amendments are in no way to affect or impair the stipulations in said treaty contained as to the Miamies west of the Mississippi, the said amendments being final, and not required to be submitted to the Miamies for their consent."

Previous to this treaty, no provision was made for the payment of annuities to the Miamies who remained in Indiana after the emigration of their tribe, separate and apart from the tribe itself, other than what was extended to certain individuals and families designated in the treaties of 1838 and 1840, and in the resolutions of 1845 and 1850. But here there is a distinct recognition of, and separate provision made for, two independent bodies of Indians of Miami blood, namely, the emigrated Miamies living in the west, and the Miamies living in Indiana, the former constituting the tribe proper, although, it would seem, the less numerous of the two.

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The "corrected list" referred to in this amendment, though not mentioned in the original treaty, furnished the data for ascertaining the share of the Miamies of Indiana in the limited annuity of $12,500, which was divided by said treaty as above shown, (the apportionment being manifestly thus: To three hundred and two Miamies of Indiana, $6,863 64, and to two hundred and forty-eight western or emigrated Miamies, $5,636 36;) so with regard to the payments of the permanent annuity of $25,000 for the years 1854 and 1855; and it also fixed the basis of apportionment as to the share of the Miamies of Indiana in the $421,438 68 agreed to be paid for the consideration before mentioned. Thus, it appears, the Miamies of Indiana contemplated in the original treaty were such only as appeared on said list, which may have included all who were previously entitled to receive in that State their proportions of the annuities of the tribe since the emigration of the latter to the west, and perhaps many more.

The appropriation of $11,062 89 to the Miamies of Indiana, by the act of March 2, 1867, is, as has already been stated, directed to be paid only to such persons as may be legally entitled to the same under the treaty of 1854 and Senate amendment thereto, without reference to subsequent legislation. From the foregoing, there does not seem to be any room for doubt as to who these persons are.

In the body of the treaty they are referred to under the general descriptions of "Miami Indians in the State of Indiana," "Indiana Miamies," and "Miamies of Indiana;" but these must be understood as comprehending only such Indians as are more particularly designated in the amendment, who may be classified and described as follows:

1. Persons embraced in the *corrected list*, agreed upon by the Miamies of Indiana in the presence of the Commissioner of Indian Affairs, in June, 1854, comprising three hundred and two names.

2. The increase of the families of persons included in said list.

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3. Persons who have been, or shall be, added to said list by the consent of the said Miamies of Indiana, obtained in council, according to the custom of the Miami tribe.

In my opinion, the persons here indicated, and no others, are legally entitled to the above-mentioned appropriation under the said treaty and amendment, "without reference to subsequent legislation."

A question has been raised on behalf of certain parties claiming to be entitled, as Miamies of Indiana, to participate in the funds set apart for the Indiana Miamies by the treaty of 1854.

It seems their names are not on the list referred to in the amendment made by the Senate; and the point made by their counsel is, that the amendment, not having been formally ratified by the political body constituting the Miami tribe west of the Mississippi, is of no validity.

It is to be observed that this amendment has been recognized and acted upon for a series of years by all parties interested in the treaty and by Congress.

After such recognition, nothing short of conclusive objections should be admitted in favor of a contrary construction.

I see no such reasons in this case. The ground assumed by the claimants is, that the only parties to this treaty are the United States and the political body called the Miami tribe, represented by its five delegates.

It appears, however, that five delegates are named in the body of the treaty as Miami Indians, residents of the State of Indiana, and as parties "present, and assenting, approving, and agreeing to and confirming said articles of agreement and convention," and they sign and seal the treaty in the character of parties, in the same manner as the five delegates. Besides this, the Senate expressly recognized them as "a fully authorized deputation" of the Miami Indians of Indiana.

Now, if it were admitted that the only party to that treaty capable of making a treaty was the political body

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called the tribe, yet we find that this party, that is, the regular delegation representing the tribe, did fully assent to an exact division of the annuities thereafter to be paid respectively to the tribe and to the Indiana Miamies, and, as to the future management of the Indiana annuities, expressly left the whole matter to the independent action of the Indiana Miamies.

The original *proviso* contained in the IVth article of the treaty, which relates exclusively to the sum of $231,004 00, set apart for the Indiana Miamies, recites, that the Miami Indians "now present from the State of Indiana agree to take the opinion of their people on their return home, and advise the department without delay." Other provisions of the treaty might be cited to show that the tribe considered the Indiana annuities as severed from all tribal management, and as a subject-matter to be administered and regulated by the United States and the other parties interested. It was, no doubt, in this light that the Senate adopted the amendment reciting that it was at the request of the Indiana Miamies, through their authorized deputation.

It was, therefore, an amendment of the treaty, made with such assent and ratification as, under the treaty, were competent to make and ratify it.

But if this were otherwise, and the amendment were considered as no part of the treaty, yet there can be no question that the United States had power, and assumed the trust, to make due provision for the payment and management of these Indiana annuities, and that the repeated recognition by Congress of the amendment has placed its validity beyond question.

I am clearly of opinion that, in the administration of this fund appropriated for the Indiana Miamies, the Indians named in the list referred to in the amendment, and their successors and representatives, as provided for in the amendment, are the sole beneficiaries.

The rights of these persons are fixed, not merely on the

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footing of law, but of solemn contract, and should not be changed or disturbed except by their consent.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. O. H. BROWNING,

Secretary of the Interior.

BOUNTY TO INDIAN REGIMENTS.

The soldiers of the first, second, and third Indian regiments, recruited by authority of the War Department, in May and August, 1861, under the act of July 22, 1861, are entitled to bounty under the act of July 28, 1866.

ATTORNEY GENERAL'S OFFICE,

September 21, 1867.

SIR: I have had under consideration the question submitted to me by your letter of the 16th instant, and have now to state my opinion. The question propounded to me is, Whether certain Indian regiments are entitled to the bounty provided in the act of July 28, 1861.

Upon examination of the papers communicated with your letter, the following appears to be a statement of the facts upon which this question arises. Three regiments of Indians, numbered as first, second, and third Indian regiments, were recruited and organized by authority of the War Department, in the months of May and August, 1862, according to the provisions of the act of Congress of July 22, 1861, that is, were enlisted as volunteers, to serve for three years or during the war. They served as such in Missouri, Kansas, Arkansas, and the Indian territory, and were honorably discharged from the military service under orders of the department of May, 1865. As to pay, allowances, and services, they were put in all respects upon the footing of other volunteers.

Objections having been made at the War Department to their right to receive the bounty of one hundred dollars

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provided in the 5th section of the act of 1861, a joint resolution was passed by Congress on the 18th of June, 1866, as follows: "That the Secretary of War be, and he is hereby, authorized and required to cause to be paid to the enlisted men of the first, second, and third Indian regiments the bounty of one hundred dollars, under the same regulations and restrictions as now determine the payment of bounty to other volunteers in the service of the United States." The 12th section of the act of July 28, 1866, provides, "That each and every soldier who enlisted into the army of the United States, after the 19th day of April, 1861, for a period of not less than three years, and, having served the time of his enlistment, has been honorably discharged, and who has received, and who is entitled to receive, from the United States, under existing laws, a bounty of one hundred dollars and no more; and any such soldier, enlisted for not less than three years, who has been honorably discharged on account of wounds received in the line of duty, and the widow, minor children, or parents, in the order named, of any such soldier who died in the service of the United States, or of disease or wounds contracted while in the service and in the line of duty, shall be paid the additional bounty of one hundred dollars hereby authorized."

Under the statement of facts here given, it seems clear that these Indian regiments are comprehended in this provision. The soldiers who enlisted in them come within every term of description, and fulfil all the conditions in the section. It is to be observed, that the language of the section is very comprehensive. It extends as well to the regular army as to volunteers, and to soldiers of every race and color, and every arm of the service; the essential elements being enlistment, service, and honorable discharge.

It appears from a letter of the Paymaster General, of the 13th of March, 1867, a copy of which I find among the papers, that he was of opinion that these regiments were not entitled to this additional bounty; and he states that

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the ruling of the War Department from the beginning has been, that these regiments were organized "as home guards, for local, and not general service," and he refers to the rules and regulations of the War Department prescribed by the Secretary of War for the payment of additional bounties under the 15th section of the act of July 28, 1866. The particular regulation supposed by the Paymaster General to apply to these Indian regiments is number 7, as follows: "Organizations irregularly in the service of the United States, or called out for special purposes, as State militia, home guards, &c., and not included in the general bounty laws, are not included within the meaning of the act."

I am unable to see, from the facts submitted in your letter, that these three regiments come within these excepted classes. They certainly were not "organizations irregularly in the service of the United States," nor were they "called out for special purposes," in the character of "State militia" or "home guards."

It does not appear that they had any sort of organization of any character, prior to their enlistment in the service of the United States; but after their enlistment they were sometimes called home guards, as in their muster-out rolls, where they are designated as follows: "The first regiment Indian infantry home guards, United States volunteers, commanded by Colonel S. Wattles, called into the service of the United States by the President of the United States, under act of Congress approved July 22, 1861, by letter from the War Department, April 2, 1862, at Leroy, Kansas, on 22d of May, A. D. 1862, to serve for three years from date of enrolment, unless sooner discharged." This is the only official paper in which this designation of "home guards" is given to them, so far as has come under my notice, and, as will be seen, it also designates them as "United States volunteers * * called into the service * * under act of Congress approved July 22, 1861."

It abundantly appears by the letters from Major General Blunt, Major General Curtis, and Brigadier General Tho-

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mas Ewing, jr., and other officers, who at various times have been in command of these regiments, that they were considered in all respects as other volunteers, and served in various States, did good service, took part in many battles, and were excellent soldiers. General Blunt states in his letter that the first and second of these regiments "were recruited and organized under" his "immediate direction, in May, 1862, and, by authority of the War Department, which letter of authority directed that they should be organized according to the provisions of the act of Congress of July, 1861." He says, "I always regarded their *status* in the service as that of other volunteer troops, and not as local militia. They never refused duly whenever ordered, always deporting themselves as good soldiers, and rendering efficient service to the Government, until they were honorably discharged on the 31st of May, 1865." And further: "I know not by what authority they obtained the name of home guards, as that title was not given them by authority from the War Department or myself." Whatever familiar name may have been given to them, there is certainly nothing in that which should change their legal *status;* for, call them what we may, they come within the full description of the bounty provision, and are precisely such soldiers as the bounty of the Government was intended to reach.

I know of no authority by which they could have been called into the service of the United States as militia or as home guards. They were in no sense subject to call or to draft as such.

The idea which I have as to home guard associations is, that they are voluntary associations, for mere local defence. But certainly these Indian regiments enlisted with no such limitation as that; but, as abundantly appears, were required and did submit to serve out of their own country, and wherever their services were needed.

Congress, in the joint resolution to which I have referred, explicitly recognizes their claims to the bounty given in the act of 1861, and designates them in that resolution as

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"enlisted men of the first, second, and third Indian regiments," and as entitled to the same bounty as other volunteers under the act of 1861. I find also that in the treaty made with the Cherokee nation of Indians, concluded on the 19th of July 1866, and ratified with amendments on the 27th of July, 1866, article XXV, are these words:

"A large number of the Cherokees who served in the army of the United States having died, leaving no heir entitled to receive bounties and arrears of pay on account of such service, it is agreed that all bounties and arrears for service in the regiments of Indian United States volunteers which shall remain unclaimed by any person legally entitled to receive the same for two years from the ratification of this treaty shall be paid," etc.

This is another explicit recognition by the treaty-making power of the United States that these Indian regiments stand upon the footing of United States volunteers in regard to all bounties, as well as arrears of pay. Upon the whole, I am clearly of opinion, that the soldiers of these regiments are entitled to bounty under the act of July 28, 1866.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

General GRANT,

Secretary of War ad interim.

PATENTS FOR CALIFORNIA LAND CLAIMS.

1. Where a survey and plat of a confirmed California land claim were made by the surveyor general, and notice of the same, with his approval, was given by publication, conformably to the act of June 14, 1860, but the surveyor general failed to transmit the survey and plat to the General Land Office until after the passage of the act of July 1, 1864, repealing the act of June 14, 1860, it was held, that it was the duty of the Commissioner to issue a patent according to the survey and plat transmitted to him by the surveyor general of California.
2. No steps having been taken to invoke the jurisdiction of the district court,

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the title to the land covered by the survey and plat vested absolutely in the claimant, and the repeal of the statute, after the title so vested, cannot be construed to have divested that title.

3. A title vested by statute is just as complete as one vested by the issuance of a patent, and where the title is vested prior to a patent, the only office of the patent is to afford the party more convenient evidence in establishing his right when brought in contest.
4. The authority to issue a patent for confirmed grants in California, after the repeal of the act of June 14, 1860, is given by the 13th section of the act of March 3, 1851.
5. Where one statute is repealed by another statute, acts done in the meantime, while it was in force, endure and stand, and are good and effectual.
6. On every act professing to repeal or interfere with the provisions of a former law, it is a question of construction whether it operates as a total or partial repeal.
7. The Secretary of the Interior has supervisory power over the acts of the Commissioner of the General Land Office in the matter of granting or refusing a patent on a California land claim, or any action of the Commissioner approving or disapproving of the survey

ATTORNEY GENERAL'S OFFICE,
September 30, 1867.

SIR: I have had under consideration your letter of the 18th of July, and have now to state my opinion upon the questions propounded to me.

The case is as follows:

A private claim to land in California, under a Mexican grant, having been duly confirmed by the proper court, a survey and plat thereof were made by the surveyor general, and notice of the same, with his approval, was given by publication, for the time and in the manner prescribed by the 1st section of the act of June 14, 1860, (12 Stats., p. 33,) during which time the plat and survey were retained in his office, subject to inspection. No application was ever made to the district court for an order requiring the survey to be returned into court. These proceedings took place whilst the act of 1860 was in force; but the surveyor general failed to transmit the survey and plat to the General Land Office until after the passage of the act of July 1, 1864. (13 Stats., p. 332.)

The Commissioner of the General Land Office disapproves of the survey, on the ground that it covers more

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land than was confirmed to the claimant, and is of opinion that the ends of justice require that a new survey and plat be made, in accordance with the judicial decree on which the claim was confirmed. Application has been made by the owner of the land for a patent.

The first question you submit for my opinion upon these facts is, Whether it is the duty of the Commissioner to issue a patent according to the survey and plat transmitted to him by the surveyor general of California after the repeal of the act of June 14, 1860; or, Whether he has the right to withhold the patent until the survey and plat are corrected, or a new survey and plat, made in conformity with his directions, shall have received his approval.

I have heretofore, in an opinion furnished to you, under date of February 15, 1867, upon the claim of Andres Castillero, in which the facts were substantially the same as those in the present case, advised that the act of 1864 could not be construed to apply to such a case. The act of 1860, (12 Stats., p. 33,) which provides for the publication by the surveyor general of California of the surveys and plats approved by him, directs him, after such publication is made, where no application has been made by any party interested to the proper district court in California for a return of the survey by the surveyor general into the district court for further examination, to transmit the plat and survey of the claim to the General Land Office without delay; and further provides, that a patent for the land as surveyed should be "forthwith" issued. It is further provided, in the last clause of the 5th section of the act of 1860, that "the said plat and survey so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States."

It is perfectly clear that, this publication having been made, and no steps having been taken to invoke the jurisdiction of the district court, the title to this land, as covered by the survey and plat, vested absolutely in the claimant, and that the repeal of the statute, after the title

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was so vested, cannot be construed to have divested that title.

As I understand the act of 1864, it could not have been intended to apply to such a case as this.

The 1st section of the act shows that it is intended to apply to cases where the subject-matter is still before the surveyor general, and no publication has been made and no title vested. It applies only to cases where he has caused "any private land claim to be surveyed and a plat to be made thereof." But the language does not extend to cases where the publication has already been made for the full term, and where it was his duty immediately to transmit the papers to the Land Office. Nor does the 2d section extend the provisions of this act to the case of a completed publication and vested title; for it makes the provisions of the 2d section apply only to "*the surveys and plats* of the surveyor general of California heretofore made," not to surveys, plats, and *publications* heretofore made and titles vested.

To make this more clear, let us suppose that in this case the surveyor general of California had, in the due performance of his duty, immediately transmitted "the plat or survey of the said claim to the General Land Office," as required by the 5th section of the act of 1860, could it be claimed that the act of 1864 would apply to such a case? Certainly not; for the plat and survey would be no longer in the hands of the surveyor general for any official action whatever. Again, suppose the case, that after the transmission of the plat and survey to the General Land Office a patent had been issued to the claimant; would the surveyor general, notwithstanding that, be authorized to proceed, under the act of 1864, to make a new publication, and commence the proceedings *de novo?*

It is very clear we can give no such construction to the act of 1864.

We can only apply that act to surveys and plats still before, or yet to come to the hands of, the surveyor gen-

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eral, *before* publication completed, before their transmission to the General Land Office, and before the issuance of a patent to the claimant.

But to read it, and especially the 2d section, so as to make it apply to all surveys and plats by the surveyor general of California heretofore made, would inevitably unsettle every title established by publication and followed by patent.

I do not see that the issue of a patent prior to the act of 1864 makes the title of the claimant more inviolable than the completed publication; for the statute expressly declares that such publication "shall have the same effect and validity in law as if a patent for the land had been issued by the United States."

It has been again and again decided, that a title vested by statute is just as complete as one vested by the issuance of a patent; and in this case, the title being so vested prior to the patent, the only office of the patent is to afford the party more convenient evidence in establishing his rights when brought in contest.

I am accordingly of opinion that the Commissioner of the General Land Office has no authority to revise this plat and survey in this case, and that no proceedings can be had to open the title by a new publication, or to unsettle it by any new survey or plat.

The issuing of a patent, under the 5th section of the act of 1860, is a purely ministerial act—"forthwith to be issued."

Whether a patent may now be issued for this land is a question of more difficulty. The act of 1860 is expressly repealed by the act of 1864, without any reservation.

If the act of 1860 were the only one providing for the issuing of patents upon confirmed grants in California, and there were no other statutory authority upon the subject, the objection arising upon the repeal would be difficult to surmount. But, under the circumstances of this case, I think the authority to issue patents for confirmed grants in California, given by the 13th section of the act

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of March 3, 1851, (9 Stats., p. 631,) may well be invoked. That act has not been expressly repealed.

It is true that the proceedings anterior to the patent, as provided in the act of 1851, have been changed and modified by the act of 1860, so that the authority to issue a patent for a confirmed grant, under the act of 1851, could only be called into exercise by a performance of the conditions required in the act of 1860.

If the act of 1860 contained no provision for the issuing of a patent after publication, the act of 1851 would only have been inconsistent with it in the matter of the proceedings prior to the issuing of the patent; in other words, the act of 1860 merely superadded other proceedings, prior to the patent, to those provided in the act of 1851.

The fact that provision was also made for a patent by the act of 1860, cannot be said to have operated as an implied repeal of the authority to issue a patent given in the act of 1851. It is in the nature of a cumulative provision.

I am therefore of opinion that there is existing authority to issue a patent for this confirmed grant.

It may be satisfactory to you to be advised of some of the authorities which sustain the foregoing opinion. Upon the point that the repeal of the act of 1860 cannot be held to disturb a title vested under that act, I refer to Dwarris on Statutes, p. 534, as follows: "Where one statute is repealed by another statute, acts done in the meantime, while it was in force, shall endure and stand, and be good and effectual."

Mr. Attorney General Black, in an opinion given to one of your predecessors, the Hon. Jacob Thompson, on the 29th of September, 1857, (9 Opinions, p. 108,) says: "A person who claims land in California, under a grant from Mexico, is entitled to have a patent for it issued out of the General Land Office whenever he shows that his claim has been finally confirmed by the commissioners, by the district court, or by the Supreme Court, if he, at the same time, accompanies that proof with a survey, certified and approved by the surveyor general of California."

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The claims now under consideration have been finally confirmed, and the proper certificate of the surveyor general has been produced. These proceedings are conclusive on you. They put the right of the claimant to a patent upon grounds which you have no authority or power to contest.

The 13th section of the act of March 3, 1851, is too plain to admit of dispute.

It will be observed that the act of 1860 puts the right to a patent upon grounds still more conclusive than the act of 1851.

It may also be proper to refer to the case of the United States *vs.* Sepulveda, (1 Wall., p. 104,) which recognizes the authority of the Commissioner of the General Land Office to revise the survey returned by the surveyor general on a California grant. That was a case under the act of 1851. However it may seem to conflict with the opinion of Mr. Attorney General Black, it cannot apply to a survey and publication made under the act of 1860.

In the case of Beard *vs.* Federy, (3 Wall., p. 478,) the nature and effect of a patent issued upon confirmation of California land claims are thus explained by the Supreme Court: "In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quit-claim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners.

"In the second place, the patent is a record of the action of the Government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation

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to which the United States thus succeeded was of course political in its character, and to be discharged in such manner and on such terms as they might judge expedient.

"By the act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated, required evidence to be presented respecting the claims, appointed law officers to appear and contest them on behalf of the Government, authorized appeals from the decisions of the tribunal, first to the district and then to the Supreme Court, and designated officers to survey and measure off the land when the validity of the claims is finally determined.

"When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the Government acts, and issues its patent to the claimant.

"This instrument is, therefore, record evidence of the action of the Government upon the title of the claimant. By it the Government declares that the claim asserted was valid under the laws of Mexico, that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the Government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the Government by title subsequent."

Upon the question, whether, notwithstanding the repeal of the statute of 1860, the provision contained in it, for the issuance of a patent upon the vesting of the title, may now be exercised, I refer to the same page in Dwarris, as follows: "On every act professing to repeal, or interfere with, the provisions of a former law, it is a question of construction, whether it operate as a total, or partial, or temporary repeal. The word 'repeal' is not to be taken

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in an absolute, if it appear upon the whole act to be used in a limited, sense."

2. As to the question submitted for my opinion touching the supervising power of the Secretary of the Interior over the acts of the Commissioner of the General Land Office, in the matter of granting or refusing a patent on a California land claim, or any action of the Commissioner approving or disapproving of the survey, I am clearly of opinion that such supervising power does exist.

I have examined upon this question the acts of April 25, 1812, July 4, 1836, March 3, 1849, and the case of Magwire *vs.* Tyler, *et al.*, (1 Black, 195,) which, in my opinion, leaves no doubt upon this point.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. O. H. BROWNING,

Secretary of the Interior.

GORMLEY'S CASE—HABEAS CORPUS.

1. The several acts of Congress relative to the jurisdiction of the courts of the United States to issue writs of *habeas corpus* do not declare that the jurisdiction of those courts shall be exclusive of the jurisdiction of the State courts even in cases provided for by federal law.
2. The enlistment of minors, in the naval service, above the age of eighteen, is valid without the consent of the parents or guardians.
3. There is no statutory provision authorizing the Secretary of the Navy to discharge persons enlisted in the naval service.
4. The power conferred on the Secretary of War to discharge minors under the age of eighteen from the army is not exclusive, and does not oust judicial inquiry upon *habeas corpus* of the legality of the enlistment.
5. Although there has been conflict of opinion on the question of the authority of a State court to discharge a person held under color of authority of the United States, there has not been any serious conflict of opinion as to the jurisdiction of a State court to require a return to its writ of *habeas corpus* in such a case and the production of the body.
6. An exception, however, exists in the case of a person shown to be imprisoned under judicial process of the United States; for there, under the decision in the case of Ableman *vs.* Booth, (21 How., 506,) the State court cannot require the production of the body of the relator.

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7. It seems that the doctrine of the decision in that case is applicable only to proceedings upon *habeas corpus*, in State courts, in cases of imprisonment under *process* issued under the authority of the United States, and does not extend to a case of imprisonment by an executive officer, having the custody or control of an enlisted person.
8. The capacity of the proper courts of the United States to take jurisdiction in *habeas corpus* of persons enlisted in the navy, does not, before its actual exercise, oust the jurisdiction of a State court.

ATTORNEY GENERAL'S OFFICE,
October 4, 1867.

SIR: I have examined the papers enclosed in yours of the 26th of September, relating to the proceedings on *habeas corpus* in the matter of Charles Gormley.

It appears that, on Monday, the 23d of September, the judge of the court of quarter sessions of Philadelphia, Pennsylvania, issued a writ of *habeas corpus*, directed to Commodore Selfridge, commandant of the navy yard at that city, commanding him to produce the body of Charles Gormley, a seaman, alleged to have been illegally enlisted in the navy. Under instructions from the Navy Department, Commodore Selfridge refused to produce the body of Gormley, and made return on the writ that Gormley was a "regularly-enlisted person, and held to service in the navy of the United States." No copy appears, in the papers sent, of the petition for the writ of *habeas corpus*, or of the grounds upon which the application was made and granted, nor do I find any copy of the writ itself among the papers.

But it appears from one of the papers that Gormley was enlisted as a marine, and the ground laid for his discharge was his alleged minority at the time of enlistment.

A copy of the return made by Commodore Selfridge to the writ is among the papers submitted to me, and is in the following words:

"I have the honor to make return to the within writ of *habeas corpus*, issued in the case of Charles Gormley, enlisted in the United States navy. That the said Charles Gormley is a regularly-enlisted person, and held to service in the navy of the United States, according to the rules

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and regulations of the recruiting service for enlisting recruits, by his signing the shipping articles, and the proper statement or declaration required for recruits to take; that the oath was regularly administered by an officer authorized to administer oaths, and that the recruit was regularly examined by the surgeon appointed for that purpose; that under the decision of the honorable Secretary of the Navy, it is not my duty to produce the body of said Charles Gormley in court; that said declination and denial of the jurisdiction of your honor is a matter of official duty, and not from any disrespect or contempt of your honorable court."

Upon this return the following order was made by the court of quarter sessions:

"And now, September 24, 1867, on proof of service of the writ of *habeas corpus*, hereinafter mentioned, on Thomas O. Selfridge, commodore United States navy, and on motion of John O'Byrne, Esq., of counsel with relator in said writ, this court order a rule to be entered upon said Thomas O. Selfridge, to show cause why an attachment should not be issued against him for contempt of court, in neglecting or refusing to obey said writ of *habeas corpus*, issued out of said court in the case of the Commonwealth of Pennsylvania, *ex relatione* Charles Gormley *vs.* Thomas O. Selfridge, commodore United States navy, tested at Philadelphia, the 19th day of September, A. D. 1867, commanding him to produce before the said court 'the body of said Charles Gormley, under his custody, as it is said, detained.' Returnable Saturday, September 28, 1867, at 10 o'clock a. m."

The question you submit for my opinion, I understand to be, what instructions are proper to be given to Commodore Selfridge to regulate his action: that is to say, whether the commodore shall be instructed to produce the body of Gormley before the court, or to resist by force, if necessary, any further writ or process from the court of quarter sessions to enforce obedience to the command of the writ of *habeas corpus*, or any process of attachment against himself under the rule.

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On application, on behalf of Commodore Selfridge, for further time to answer the rule, the court has extended the return day to Saturday, the 5th instant.

In consideration of the very grave questions which arise in this case, I will first direct my attention to the law regulating the *habeas corpus* in Pennsylvania. The statutes of Pennsylvania on the subject of *habeas corpus*, one of which was passed before the adoption of the federal Constitution, cover in substance the *habeas corpus* act of Charles II, relating to imprisonment under criminal process, and the common-law remedy for other illegal detention. They give the writ in all cases of imprisonment or restraint of personal liberty, except in cases of commitment for treason or felony. By the act of 1785 it is provided, "That nothing in this act shall extend to discharge out of prison any person guilty of, or charged with, treason, felony, or other high misdemeanor, in any other State, and who, by the Confederation, ought to be delivered up to the executive power of such State; nor any person guilty of, or charged with, a breach or violation of the laws of nations;" or "any person charged with debt or other action, or with process in any civil case."

The refusal of the judge or court, upon a proper application, to grant the writ, involves a liability to suit in favor of the party aggrieved, and recovery of a penalty of £300. The refusal of the officer, or other person to whom the writ is directed, to make the return required by law, or to bring in the body of the prisoner, according to the command of the writ, involves such officer or other person in a contempt of the court issuing the writ, and a liability to the party aggrieved of £100; and he is further declared incapable "to hold or execute his said office." It is further provided, "that the said judge or justice may, according to the intent and meaning of this act, be enabled, by investigating the truth of the circumstances of the case, to determine whether, according to law, the said prisoner ought to be bailed, remanded, or discharged; the return may, before or after it is filed, by leave of the said judge

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or justice, be amended, and also suggestions made against it, so that thereby material facts may be ascertained."

It is also provided, that "in all cases where any person" is "confined or restrained of his or her liberty, under any color or pretence whatsoever, and upon oath or affirmation made by such person so confined or restrained, or by any other in his or her behalf, of any actual confinement or restraint, and such confinement or restraint, to the best of the knowledge and belief of the person so applying, is not by virtue of any commitment or detainer for any criminal or supposed criminal matter, a *habeas corpus*, directed to the person or persons so confining or restraining the party, shall be awarded and granted, in the same manner, and under the same penalties, to be recovered from the same persons, as is hereinbefore directed; and the court, judge, or justice before whom the party so confined or restrained shall be brought, shall, after the return is made, proceed, in the same manner as is hereinbefore prescribed, to examine into the facts relating to the case, and into the cause of such confinement or restraint, and thereupon either bail, remand, or discharge the party so brought, as to justice shall appertain." Full power is vested in the court of general quarter sessions of the peace, in the county of Philadelphia, or either of the judges thereof, to allow and issue writs of *habeas corpus*.

It thus appears, so far as the laws of Pennsylvania are concerned, that this was a case within the jurisdiction of the judge of the court of quarter sessions who issued this writ; that his duty was imperative to issue it; that the production of the body was required; and that the judge, as to the facts stated in the return, is not concluded by the return, but may enter into an investigation of its truth, and of the facts of the case.

I proceed next to the legislation of the United States upon the subject of the writ of *habeas corpus*. The act of September 24, 1789, section 24, (1 Stats., 81,) confers upon the courts of the United States and the respective judges thereof, power to issue writs of *habeas corpus*, for the pur-

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pose of inquiring into the cause of commitment, agreeably to the principles and usages of law, provided that it "shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The act of March 2, 1833, section 7, (4 Stats., 634,) commonly known as the force bill, extends the jurisdiction of the judges over the writ to all cases of prisoners in jail, who may have been committed for any act done, or omitted to be done, in pursuance of a law of the United States, or any order or decree of any court or judge thereof.

The act of August 29, 1842, (5 Stats., 539,) further extends this jurisdiction to all cases of prisoners in jail or confinement who, being subjects of a foreign State and domiciled therein, shall be in custody under any authority or law of the United States, or any one of them, on account of any act done or omitted, under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction of any foreign State or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.

The *habeas corpus* act of March 3, 1863, (12 Stats., 755,) has no application to this case, and it became inoperative on the termination of the rebellion.

It will be observed, that neither of these acts, nor any other act of Congress which has come under my notice, declares that the jurisdiction of the courts of the United States shall be exclusive of the jurisdiction of the State courts, even in the cases provided for by federal law.

The act of February 5, 1867, (14 Stats., 385,) gives the courts of the United States power to issue the writ of *habeas corpus* in all cases where a party is restrained of his liberty, in violation of the Constitution or federal law, and provides for the course of proceedings; and pending such proceedings, and after final judgment of discharge, any proceeding against the person so alleged to be restrained

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of his liberty in any State court, by or under the authority of the State, shall be held void.

I will next examine the legislation of Congress in regard to the enlistment of minors in the navy of the United States.

The act of June 30, 1789, section 5, (1 Stats., 575,) gave the President discretion to permit the employment of a proportion of boys on board the frigates and other vessels of the navy, according to the exigencies of the service. The act of April 21, 1806 (2 Stats., 390) authorizes the public armed vessels of the United States to be officered and manned as the President shall direct, provided, that "the whole number of able seamen, ordinary seamen, and boys, shall not exceed nine hundred and twenty-five."

The act of June 31, 1809, (2 Stats., 514,) authorizes the President to man and fit out certain frigates, and also to equip, man, and employ in actual service so many of the public armed vessels then laid up in ordinary, and gun-boats, as in his judgment the public service may require; and, to carry this provision into effect, he is, by section 2 of the same act, empowered to cause to be employed, in addition to the number then authorized by law, "thirty-six hundred able seamen, ordinary seamen, and boys, who shall be engaged to serve for a period not exceeding two years," but who may be discharged sooner, at the discretion of the President.

The act of May 15, 1820, (3 Stats., 606,) amends the act of 1809 "so far as to authorize the enlistment of able seamen, ordinary seamen, and boys, during the continuance of the service or cruise for which they shall be enlisted; not, however, to exceed the period of three years."

The act of March 2, 1837, section 1, (5 Stats., 153,) entitled "An act to provide for the enlistment of boys for the naval service, and to extend the enlistment of seamen," enacts, "that it shall be lawful to enlist boys for the navy, with the consent of their parents or guardians, not being under thirteen nor over eighteen years of age, to serve until they shall arrive at the age of twenty-one years; and

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it shall be lawful to enlist other persons for the navy, to serve for a period not exceeding five years, unless sooner discharged by direction of the President of the United States;" and repeals so much of the act of May 15, 1820, as is inconsistent with this provision. By the act of March 3, 1845, (5 Stats., 795,) the term "persons," used in the 2d and 3d sections of the act of March 2, 1837, is to be construed to include marines.

The act of July 1, 1864, (13 Stats., 342,) authorizes the transfer of "any person enlisted in the military service of the United States" to the navy or marine corps, to serve the residue of his term of enlistment therein, on application made to the Navy Department, and approval thereof by the President.

Under the acts of 1806, 1809, and 1820, the enlistment of boys in the navy, without reference to age, was authorized for periods of service varying from two to three years.

The act of March 2, 1837, authorizes the enlistment of boys, between the ages of thirteen and eighteen, with consent of their parents or guardians, to serve until twenty-one; but it also provides that *other persons* may be enlisted for a period not exceeding five years, unless sooner discharged.

The latter clause of this act would seem to include minors above the age of eighteen, and extends the period for which they and other seamen may be enlisted; while the former clause of the act purports to take away the authority to enlist minors under that age, except with the consent of their parents or guardians.

But this restriction in regard to the enlistment of minors, under the age of eighteen, requiring the consent of their parents or guardians, necessarily implies that Congress intended to dispense with such consent in the enlistment of minors above that age. It follows, therefore, that the enlistment of minors above the age of eighteen, as is the case in the army, seems to be valid without the consent of the parents or guardians.

It may be well, in this connection, to refer to the fol-

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lowing acts of Congress on the subject of enlistments in the army. Section 5 of the act of September 28, 1850, (9 Stats., 507,) provides, "That it shall be the duty of the Secretary of War to order the discharge of any soldier of the army of the United States who, at the time of his enlistment, was under the age of twenty-one years, upon evidence being produced to him that such enlistment was without the consent of his parent or guardian." The act of February 13, 1862, section 2, (12 Stats., 339,) provides, "That the 5th section of the act of 28th of September, 1850, providing for the discharge from the service of minors, enlisted without the consent of their parents or guardians be, and the same hereby is, repealed: *Provided*, That hereafter no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age." The 20th section of the act of February 24, 1864, (13 Stats., 10,) provides, "That the Secretary of War may order the discharge of all persons in the military service who are under the age of eighteen years at the time of the application for their discharge, when it shall appear, upon due proof, that such persons are in the service without the consent, either express or implied, of their parents or guardians," upon repayment to the Government and to the State and local authorities of all bounties and advance pay which may have been paid to them. This 20th section was amended by the 5th section of the act of July 4, 1864, so as to make it imperative upon the Secretary of War to discharge minors under the age of eighteen years, under the circumstances and conditions prescribed in this 20th section.

I find no statutory provision conferring similar authority upon the Secretary of the Navy with regard to the discharge of persons enlisted in that arm of the service. The authority conferred upon the Secretary of War, in regard to the discharge of army recruits, is not declared to be exclusive; and it may well be doubted whether such power, conferred upon a merely ministerial officer, can be held to oust judi-

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cial inquiry, upon *habeas corpus*, of the legality of the enlistment.

[*See Ex Parte* Randolph, 2 Brockenbrough's R., 479; United States vs. Dickson, 15 Peters, 162.]

A provision vesting authority similar to that now vested in the Secretary of War is not new in congressional legislation.

As far back as 1806, it was provided that no discharge shall be given to a non-commissioned officer or soldier, until his term of service is expired, but by order of the President, the Secretary of War, the commanding officer of the department, or the sentence of a general court martial. This provision has not been understood to oust the jurisdiction of courts upon *habeas corpus*, in the matter of the discharge of enlisted soldiers.

I do not deem it necessary in the present posture of this case to enter upon the vexed question of the power of State courts, in proceedings on *habeas corpus*, to discharge persons held in custody under the authority of the United States.

The question now to be considered is, not as to the power of the court of quarter sessions of Philadelphia to discharge Gormley from the custody of Commodore Selfridge, but it is upon the sufficiency of the return made by the commodore to the writ which has been served upon him.

Commodore Selfridge has very properly decided that it was his duty to make a return to this writ, in which he states the cause of detention, but declines to produce the body of Gormley before the court. For that refusal, if persisted in, an attachment will, in all probability, be issued by the court, and if, under the instructions that he has received from the Navy Department, he shall resist its execution by force, an actual collision between the State and federal authorities is imminent. Before an executive or ministerial officer of the United States can be safely advised or instructed to resist by force the judicial process of a State court, the right and duty to offer such resistance must be founded upon clear law.

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Confining the inquiry to the jurisdiction of a State court in *habeas corpus*, upon the application of a person detained in the naval service in virtue of an enlistment under the laws of the United States, the weight of judicial authority is clearly in favor of such jurisdiction, not only to entertain the case, but to remand into custody, or to discharge from custody. As I have said before, the general question as to the right of a State court to entertain full jurisdiction in cases of illegal confinement, under the authority of the United States, cannot be considered as finally settled. There are conflicting decisions between the State courts and the district and circuit courts of the United States; the preponderance of authority being in favor of the jurisdiction. The settlement of the question must await a decision by the Supreme Court of the United States, or congressional legislation upon the subject.

The collision of opinion hitherto has been upon the authority of a State court to discharge. In nearly all the cases, the body of the applicant was produced according to the command of the writ issued by the State court; and I am not aware that there has been any serious conflict of opinion as to the jurisdiction of a State court to issue and entertain the writ, and enforce obedience to it, to the point of requiring a return and the production of the body.

The production of the body on *habeas corpus* has been said to be the life of the writ, and the cases in which it has been dispensed with are few in number, and only admitted upon the footing of necessity. It is accordingly dispensed with where there is an actual disability in the person to whom the writ is directed, from want of possession or custody of the body, or power to produce the body, or where the person retained is so sick and languishing that he could not be produced without peril to his life.

To these, which are the commonly-received exceptions, we may now add another. Upon the authority of Ableman *vs.* Booth and the United States *vs.* Booth, (21 How., 506,) where the party for whose release the *habeas corpus* is issued by a State court is, upon the return of the officer

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having him in custody, shown to be imprisoned under judicial process of the United States, the production of the body before the State court cannot be required.

These cases were upon the following facts: Booth was in the custody of the United States by process from a commissioner, under the act of Congress of September, 1850, on a charge of having aided the escape of a fugitive slave from a deputy marshal of the United States, who had the fugitive in custody on a warrant issued by the district judge of the United States.

Upon his application to one of the justices of the supreme court of Wisconsin, within whose territorial jurisdiction he was confined, a writ of *habeas corpus* was granted, to which the marshal made return that he held Booth in custody by virtue of a warrant of the commissioner, a copy of which he annexed to and returned with the writ, and he also brought Booth into court, according to the command of the writ.

Booth was discharged by the justice of the Supreme Court who granted the writ; and afterwards, upon *certiorari* to the supreme court of Wisconsin from this order of discharge, the decision on the *habeas corpus* was affirmed.

After Booth's discharge, an indictment was found against him in the district court of the United States for the district of Wisconsin for the same offence with which he was charged before the commissioner, and upon trial of the indictment Booth was found guilty, and was sentenced to be imprisoned for one month, to pay a fine of $1,000 and the costs, and to remain in custody until the sentence should be complied with.

Three days after this sentence, and while Booth was undergoing his imprisonment, he made application to the supreme court of Wisconsin for a writ of *habeas corpus*, alleging that his imprisonment was illegal on various grounds, and, among others, because the fugitive slave law was unconstitutional. The return made to this writ was that Booth had been committed to custody under the

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sentence aforesaid, and with the return the body of Booth was also produced.

Upon the hearing of the case, the supreme court of Wisconsin adjudged the imprisonment illegal, and discharged Booth from imprisonment and restraint.

Both these cases, so decided by the supreme court of Wisconsin, were brought upon writ of error before the Supreme Court of the United States, and the judgments in both cases were reversed.

The point for decision was, whether there was error in the judgments discharging Booth from imprisonment.

The Supreme Court of the United States held that they were erroneous, and that the United States commissioner had full power to order Booth into custody; and if there were any defect in the exercise of his power, it was for the tribunals of the United States to revise and correct it, and not for the State court; and that, as to the sentence of the district court, it had exclusive and final jurisdiction, by the laws of the United States; and that neither the regularity of its proceedings, nor the validity of its sentence, could be called in question in any other court, either of the State or of the United States, by *habeas corpus* or by any other process.

No question as to the production or non-production of the body of Booth, under the *habeas corpus* issued by the State court, arose in the case. It was upon the final judgment of discharge that the writ of error was brought and decided.

In the opinion, the course of proceedings on *habeas corpus* from a State court, as to a person imprisoned under the authority of the United States, is thus stated:

"We do not question the authority of a State court or judge who is authorized, by the laws of the State, to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire,

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in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty; and it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody.

"This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. But after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him, and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government; and consequently, it is his duty not to take the prisoner, or suffer him to be taken, before a State judge or court, upon a *habeas corpus* issued under State authority.

"No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to

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require him to be brought before them; and if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal, or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference.

"No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

The language used in this opinion is not quite so specific as might have been expected; but I can only understand it as applicable to proceedings upon *habeas corpus* in State courts, in case of imprisonment under *process* issued under the authority of the United States.

That was the sort of imprisonment in the cases before the court, and it is to that that any doubtful expressions used in the opinion are to be applied.

A careful attention to the language used satisfies me that no other sort of imprisonment was within the contemplation of the court.

In the first place, we find a general statement, that the writ is to be refused when it appears "that the person imprisoned is in custody under the authority of the United States."

This is the most general expression used in the opinion, and yet this does not seem properly to comprehend the case of a person held under enlistment. He can hardly be said to be imprisoned under the authority of the United States. Throughout the opinion, the party to whom the benefit of the writ is denied is characterized as a prisoner.

In another clause, the nature of the custody is yet more distinctly defined. The court say, it is the duty of the marshal or other person holding him to make known, by a proper return, the authority under which he detains him; "it is, at the same time, imperatively his duty to

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obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government."

It would not be safe to extend this right of refusal, and the exercise of force to sustain it, to an executive officer of the United States who has under his control an enlisted person; nor can it be argued, from the language of this opinion, in which reference is made to a person *other* than the marshal having custody of the prisoner, that it was intended to apply to such a person as an officer having the control of an enlisted person. Booth was, in fact, held in imprisonment, under process from the United States court, by a person other than the marshal; for he had been transferred by the marshal, under a law of Congress, to a jail of the State of Wisconsin, and was in the immediate custody of the keeper of the jail; and it is in reference to that condition of imprisonment that this expression, *person other than the marshal*, is to be understood.

The construction I have applied to the language used by the Supreme Court, confining the right to refuse production of the body to the case of a prisoner held under judicial process of the United States, is further fortified by authority in England and in the United States.

The English courts have admitted, as one exception to the duty of producing the body on *habeas corpus*, a return that the party was imprisoned "for treason or felony, plainly expressed," or was "convict or in execution by legal process."

This exception was admitted under an implication arising upon a clause in the 1st section of the act of Charles II. (Hurd on Habeas Corpus, p. 254.) Mr. Hurd adds: "This, however, is not only an exception to the general rule, but should be regarded as a particular indulgence; for if the officer had a right to stand upon his construction of the warrant of commitment, there would have been but little gained by the act of 31 Charles II."

Nor can I understand the language of the court in Ableman vs. Booth, in reference to the exclusive jurisdiction of

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the United States, as applicable to any other jurisdiction over persons restrained of their liberty than that which depends upon jurisdiction acquired under process of the courts of the United States.

Undoubtedly Gormley is detained as an enlisted person under the laws of the United States; but as yet he has not been brought within the exclusive jurisdiction of any court of the United States, nor is there any act of Congress which declares that jurisdiction over his person and his detention shall only be exercised by the federal judiciary.

So, too, while it is clear that the proper courts of the United States may entertain jurisdiction in *habeas corpus* of persons enlisted in the navy, yet that capacity to take jurisdiction does not, before its actual exercise, oust the jurisdiction of a State court.

The grant of judicial power to the federal courts in all cases, in law and equity, arising under the Constitution and laws of the United States, does not necessarily divest the jurisdiction of State tribunals in the same cases.

There is a vast field of concurrent jurisdiction remaining in the State courts, which Congress has not hitherto brought within the exclusive cognizance of the federal judiciary.

There is, then, no act of Congress, and no decision of the Supreme Court of the United States, which, in the matter of *habeas corpus*, excludes a State court from the exercise of its own proper jurisdiction to entertain the case, and to require a proper return and the production of the body of a person detained by an officer of the navy as an enlisted person.

I am accordingly of opinion, that the court in this case had authority to issue the writ, and to compel a return and the production of the body; and that instructions should be sent to Commodore Selfridge to answer the rule for an attachment, and to produce the body of Gormley before the court; and that the instructions heretofore sent him to make resistance by force should be revoked.

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I do not deem it proper at this time, and upon the question referred to me, to go into any further questions which may arise before the State court after the production of the body.

But I do not doubt that, after the jurisdiction of the court has been vindicated by obedience to its writ, a proper decision will be had upon the question of discharge. If it should happen that the court order a discharge, and upon examination it should be deemed expedient to carry the question to the Supreme Court of the United States for final decision, it will then be proper to inquire by what mode of proceeding that purpose can be accomplished.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. GIDEON WELLES,
Secretary of the Navy.

THE PORTUGESE MISSION.

It was not the intention of Congress, by the act of February 28, 1867, to put an end to the Portugese mission, but simply to prohibit the payment of the salary for personal services of the minister.

ATTORNEY GENERAL'S OFFICE,
October 7, 1867.

SIR: I have considered the question submitted to me in your letter of the 25th ultimo, as to the construction of recent acts of Congress, in reference to the minister at Portugal.

By the diplomatic and consular appropriation act of July 25, 1866, (14 Stats., 224,) there is, in the first place, appropriated, for the fiscal year ending June 30, 1867, the sum of $308,500 for salaries of envoys extraordinary, ministers, and commissioners of the United States, at Great Britain and other enumerated courts. Portugal is not included in this enumeration, but the following appropriation

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is made in the same act: "For contingent expenses of *all* the ministers abroad, $50,000."

We find next, in the same act, under the head of "Commercial Agencies," in one of the sections making appropriations for the salaries of consuls, commercial agencies, and consular clerks, this provision: "And no money shall be paid to the present minister resident at Portugal, out of any funds whatsoever, on account of further services in his office."

I am of opinion, that the contingent expenses of the mission to Portugal are payable under these provisions, and that the intention of the provision as to the minister resident is simply to cut off all payment to him on the footing of his personal salary or services.

The next act to which you call my attention, is that making appropriations for consular and diplomatic expenses for the year ending June 30, 1868, passed on the 28th of February, 1867. We find, in the first place, an appropriation of $301,000 for the salaries of envoys extraordinary, ministers, and commissioners of the United States, at Great Britain and other enumerated courts, in which Portugal is included, together with the following provision: "*Provided*, That no money shall be paid to the present minister at Portugal, out of any fund whatever; and this provision shall continue in force until repealed by Congress, and no money hereby or otherwise appropriated shall be paid for the support of an American legation at Rome, from and after the 30th day of June, 1867." The same act contains the following appropriation: "For contingent expenses of all the missions abroad, $50,000.

It will be observed, that the language of this proviso, as to the minister resident at Portugal, is more general than in the former act. No money is to be paid to him "out of any fund whatever." I am inclined to think, notwithstanding this general expression, that the intent of this act was aimed at the minister personally, to forbid payment to him of any money for his salary or personal services, either out of the direct appropriation made for the

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payment of the salaries of ministers, and of his salary, as enumerated among the others, or out of the appropriation for contingent expenses, or out of any other of the appropriations made by the act. It does not appear that it was the intention of Congress to withdraw the Portugese mission. The contrary appears to have been the intention with regard to the legation at Rome; for there the language is, that no money is to be paid for "*the support*" of that *legation*, after the 30th of June, 1867.

Collating these two provisions, and marking the change of phraseology, I am forced to the conclusion, that it was not the intention of Congress to put an end to the Portugese mission, or to withhold payment of the contingent expenses necessary to maintain it: and that the true meaning and scope of the act will have their full effect by confining the prohibition to the payment of the salary for personal services of the minister alone, and consequently the proper contingent expenses may lawfully be paid.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

TAXATION OF STATE RAILROADS AND MANUFACTURES.

1. Railroads owned exclusively by a State, and operated by its own agents, do not fall within the provisions of the internal revenue act of June 30, 1864.
2. Articles manufactured by convict labor in the penitentiaries of a State, for the use or on account of the State, are not subject to taxation under the internal revenue laws.

ATTORNEY GENERAL'S OFFICE,
October 14, 1867.

SIR: I have received your letter of the 9th instant, calling my attention to two questions, heretofore submitted by you for my opinion, under the internal revenue law.

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1. The first question is, Whether railroads, owned exclusively by a State and operated by its own agents, fall within the provisions of the internal revenue act of June 30, 1864.

The sections of that act having direct application to the question are the following, section 103. (13 Stats., 275.) It provides: "That every person, firm, company, or corporation, owning or possessing, or having the care or management, of any railroad, canal, steamboat, ship, barge, canal-boat, or other vessel, or any stage-coach, or other vehicle, engaged or employed in the business of transporting passengers or property for hire, or in transporting the mails of the United States, or any canal, the water of which is used for mining purposes, shall be subject to and pay a duty of two and one half per centum upon the gross receipts of such railroad," etc. This section contains a proviso, in these words: "That all such persons, companies, and corporations, shall have the right to add the duty or tax imposed hereby to their rates of fare, whenever their liability thereto may commence, any limitations which may exist by law or by agreement with any person or company, which may have paid or be liable to pay such fare, to the contrary notwithstanding."

Section 122 of the same act provides as follows: "That any railroad, canal, turnpike, canal-navigation or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip, or money due or payable to its stockholders, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest or coupons, dividends or profits, whenever the same shall be payable."

This section further authorizes the company to deduct

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from payments on account of any interest or dividends this duty of five per centum, and it requires each company to make a return in duplicate to the assistant assessor, and the duty to be paid to the commissioner of internal revenue, and the account verified by the oath or affirmation of the president or treasurer of the company.

For any default in rendering returns or making payment of the duty, the company incurs a penalty of one thousand dollars, and thereupon the assessment and collection of the duty and penalty "shall be made according to the provisions of law in other cases of neglect or refusal."

The latter clause of the 44th section of the internal revenue act of July 13, 1866, (14 Stats., 163,) contains the following declaratory provision: "And any word or words, in any and all parts of this act, and of all acts to which this act is additional, indicating or referring to person or persons, shall be taken to include partnerships, firms, associations, bodies corporate or politic, or any other party whatsoever, when not otherwise designated or manifestly incompatible with the intent thereof."

We are, therefore, to read the sections hereinbefore quoted as if the words "bodies corporate or politic" were included as terms of description.

I have first to observe, that the tax imposed by section 103 is not imposed upon the railroad, but on the person or corporation owning the same. We must, therefore, see whether, as to ownership, a State is comprehended in the description of owners named in that section, as extended and defined in the declaratory act.

It has been suggested, that a State owning a railroad is comprehended within the terms "body corporate or politic." Undoubtedly, in a general sense, a State is a corporate body, or a body corporate or politic. But these terms also very well express the character of a private corporation, especially of one whose uses are public, like a railroad. In our elementary books, corporations of that character are defined to be *bodies politic and corporate.* We

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give, therefore, full effect to the terms, when we show that such corporations come under the designated class.

The first general division of corporations is into public and private corporations, in which latter class, as I have said, are embraced such private corporations as yet are clothed with some public use or trust, to which latter class an ordinary railroad corporation belongs.

But a State is a *public* corporation, and to designate it as a corporation at all, that would be its proper designation. We are here endeavoring to arrive at the intention of the legislature upon the question whether, when the object was to define the sort of ownership of a railroad which would make it subject to taxation, it was the legislative intent to embrace a railroad owned and operated exclusively by a State? If we can suppose it to have been the intention to include a State, the short and explicit mode of expressing it was to have used the term *State*, as by saying all railroads owned by "corporations and bodies politic, and by a State," etc.

Certainly, there was no necessity for circumlocution here. The word *State* is again and again used, through these internal revenue acts, as descriptive of that sort of political corporation; and in one of the acts Congress declares the meaning of the word *State*, wherever it is used in those acts, as follows: "That the term State, wherever used, shall be held to include Territories of the Union and the District of Columbia, as well as the States."

They have nowhere said that the term shall be held to include bodies politic or corporate where used in the act.

Standing, then, upon the language used in these sections alone, I am of opinion that they do not authorize a tax upon the gross profits of a railroad owned by a State, or upon interest payable upon its bonds, if it have any outstanding, or upon its accumulated profits.

Looking, next, to other provisions of the internal revenue laws as to the mode of enforcing the payment of such taxes, the duty of making returns, the penalties for

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failure to make returns, and for non-payment of the taxes assessed, the proceedings by distraint, and by sale of the property of the delinquent party, and the consequences which would arise if such proceedings against the property of a State were had, the conclusion which I stated is fully confirmed, that a State and its property do not come within the operation of the act.

So, too, the act of August 5, 1861, levying a direct tax on all lands within the respective States, contains, in the 13th section, the following proviso: "That all property, of whatever kind, coming within any of the foregoing descriptions, and belonging to the United States or any State, or permanently or specially exempted from taxation by the laws of the State wherein the same may be situated at the time of the passage of this act, together with such property, belonging to any individual who actually resides thereon, as shall be worth the sum of $500, shall be exempted from the aforesaid enumeration and valuation, and from the direct tax aforesaid."

Here we see plainly enough the purpose of Congress to place the real property of a State upon the same footing of immunity against federal taxation as similar property of the United States; and if that policy applies to the real property of a State, it certainly would be equally applicable to such property as is now in question.

And we see further, by the proviso which I have quoted, it was the policy of Congress, not only to exempt from federal taxation the real property belonging to a State, but such other real property belonging to individuals or corporations as had been exempted from taxation by State law.

With this clear manifestation of the policy of Congress, as shown in the direct tax law, we could scarcely expect a change of this same policy in subsequent internal revenue acts. The income of a railroad owned exclusively by a State forms one branch of its revenue, and may be very essential for the support of the State; and it would be a very singular provision for Congress to lay a tax for the

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support of the federal Government, chargeable upon the revenue necessarily appropriated for the support of a State government.

The same principle which denies to a State power to raise a revenue by taxation on federal property or sources of revenue or means of carrying on its duties, would equally forbid taxation of State revenue for federal purposes.

The continued existence of the State governments in all the powers necessary for their support is just as essential to our federal system as the continuance and support of the federal Government. Nothing but the clearest expression could satisfy me that Congress, in these internal revenue acts, has had any purpose to interfere with the appropriate means through which a State draws its revenue for its own support. And I see nothing in these acts anywhere that indicates such an intention.

2. The next question submitted to me may be stated as follows: Do articles manufactured by convict labor, in the penitentiaries or prisons of a State, for the State, come within the internal revenue taxation?

The 94th section of the act of June 30, 1864, declares, that "there shall be levied, collected, and paid" certain duties upon the articles, goods, wares, and merchandize thereinafter mentioned, "which shall be produced and sold, or be manufactured or made and sold, or be consumed or used, by the manufacturer or producer thereof, or removed for consumption, or for delivery, to others than agents of the manufacturer or producer, within the United States or Territories thereof."

These duties are, by the same section, required "to be paid by the producer or manufacturer," upon the articles designated.

In the 79th section of the same act, the "manufacturer" is defined to mean "any person, firm, or corporation who shall manufacture, by hand or machinery, any goods, wares, or merchandize, exceeding annually the sum of $1,000."

As has been shown, the word "person" is, by the declar-

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atory act of June 30, 1864, made to comprehend "bodies politic and corporate."

The employment of convicts is a branch of prison discipline, and one controlling purpose is that of reformation, by teaching habits of industry and useful occupation. A subordinate purpose of revenue to the State from the proceeds of such labor may also enter into the system. For the reasons which I have set forth at large, in answer to the first question, I take it to be clear, that a State is not a manufacturer within the meaning of the law.

Other provisions of the law make this still more apparent. For if a State is, under these circumstances, to be considered a manufacturer, then a State cannot employ its convicts in manual labor until it takes out a license and pays a license-fee of $10, under sections 71 and 79 of the act of 1864. So, too, the provisions in the acts of 1864 and 1866, imposing penalties for the failure of manufacturers to pay duties, etc., the lien given on real and personal property for non-payment, and the distress, seizure, and sale of such property, and the forfeiture and sale of the manufactured articles, are wholly inconsistent with the idea that a State can be subjected to that sort of regulation.

I am accordingly of opinion, first, that neither railroads owned by a State, or the gross earnings thereof, or the profits accumulated therefrom, or the dividends paid upon its bonds; nor, secondly, articles manufactured by convict labor in the penitentiaries of a State, for the use of the State, or on account of the State, are subject to taxation, either under the act of 1864, or any other of the internal revenue laws.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH McCULLOCH,

Secretary of the Treasury.

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CASE OF ALFRED RUSSELL.

A district attorney, who is employed by the Attorney General to argue a case in which the United States is concerned as special counsel before the Supreme Court, is entitled to receive a proper compensation for his services; and such compensation is not returnable in his emolument account, and is no part of his maximum allowance, provided by the act of 1853.

ATTORNEY GENERAL'S OFFICE,
October 22, 1867.

SIR: I have had under consideration your letter of the 22d of July last, in reference to the account of Alfred Russell, of Detroit, in which he claims the sum of $3,500 for services in the Supreme Court of the United States, at the December term, 1866, in the case of The United States vs. Le Gardeur de Repentigny, *et al.*

The facts touching this claim are briefly as follows: Le Gardeur de Repentigny and others prosecuted a suit in equity against the United States, under a special act of Congress, in the United States district court for the eastern district of Michigan.

This suit was based upon an old French grant, dating back as far as the year 1750, and was for a large tract of land, at the Sault St. Marie, which included about two hundred and seventy thousand acres of land. Mr. Russell, as district attorney of the United States, defended this case for the Government in the district court, where it was pending for a number of years. The decree in that court was in favor of the claim, and at the instance of Mr. Russell an appeal was taken by the United States from that decree to the Supreme Court of the United States.

When I came into office as Attorney General, I found that case upon the docket, which stood ready for argument at the approaching December term, 1866. Upon looking into the record of the case, I found it very voluminous, and that it involved questions, arising under French law, which were altogether new to me, and I saw that it was absolutely necessary to engage the services of counsel familiar

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with the case, in order to facilitate my own preparation, and to have the case properly argued in the Supreme Court. Knowing that Mr. Russell was thoroughly acquainted with the case, and could render me more valuable assistance than perhaps any other counsel I could employ, I determined to engage his services.

Upon my application, Mr. Russell consented to appear with me. He came on to Washington in advance of the argument of the case, in time to afford me the opportunity of consultation and preparation. I finally argued the case with him before the Supreme Court of the United States, and the result was, that the decision of the district court was reversed, and the United States relieved altogether from the claim.

You say, in reference to this claim, "These services were rendered on behalf of the United States at the request of the head of a department, when Mr. Russell was the attorney of the United States for the eastern district of Michigan. Although it was no part of Mr. Russell's duty to appear in the Supreme Court, yet the act of Congress, as interpreted by one of your predecessors, forbids the 'attorney from retaining more than six thousand dollars per annum for his own personal compensation. Whatever he earns beyond that sum and the aggregate expense of his office he must pay into the Treasury.'" (9 Opinions, 146.)

The opinion referred to does not, in my judgment, at all affect the claim of Mr. Russell.

The facts upon which the opinion of the Attorney General was given were wholly different from those which exist in this case, and they are thus stated by Attorney General Black: "Certain actions were brought against collectors and other federal officers in the city of New York. To these actions Mr. McKeon, the then attorney of the United States, in pursuance either of special orders or general instructions, appeared and took measures for their defence. While they were pending, Mr. McKeon went out of office, and Mr. Sedgwick took his place as district attorney."

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The act regulating fees, passed August 16, 1856, (11 Stats., 50,) provides, in section 12, "That all accounts of the United States district attorneys for services rendered in cases * * * instituted against the officers of the United States, or their deputies, or duly-appointed agents, for acts committed or omitted or suffered by them in the lawful discharge of their duties, shall be audited and allowed as in other cases, assimilating the fees as near as may be to those provided by said act of February 26, 1853, for like or similar services."

The services rendered by the district attorney, in the case before Mr. Attorney General Black, were rendered by him *as district attorney*, and within his proper district, and the act to which I have referred makes special provision for the payment of his fees, the amount of which is to be ascertained by assimilation or comparison with those provided for similar services in the act of 1853.

It is further stated by Mr. Black, as the result of his opinion, "that the services of a district attorney, in defending officers for official acts, are, and must always be, rendered at the request of the head of a department; and the legal compensation allowed for them in the fee-bill is such sum as may be agreed on." And, as I further understand him, his opinion seems to have been, that the fees for this service are to be returned under his emolument account, and make a part of the maximum of $6,000 to which he is limited. I am not quite sure that, in this respect, I have correctly interpreted the opinion of Mr. Black, and it is not necessary, so far as Mr. Russell's claim is concerned, to settle that point.

It is very clear that Mr. Black considers services rendered by a district attorney, at the request of the head of a department, a sort of service which the district attorney is bound to perform, and that it is necessarily limited to his official action within his own State or district.

The case of Mr. Russell stands upon a totally different foundation. Mr. Russell was not employed *as district attorney*, but as *special counsel*, to assist the Attorney General.

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His services were not to be rendered anywhere within his district, but in a case not then pending in his district, but before the Supreme Court of the United States. A district attorney, like any other lawyer, is at liberty to practice as a counsellor at law, either in his own State or, if admitted to the bar of the Supreme Court of the United States, in that court, and the fees which he earns as such counsellor he is entitled to. They certainly form no part of his official fees or emoluments. He was not bound at my request to argue this case in the Supreme Court of the United States, as he would have been bound to manage a case, in which a United States officer was concerned, in the courts in his own district. Nor was my authority to employ him confined to the provision in the act of 1853, authorizing heads of departments to employ counsel; for you will see, by reference to the act of March 2, 1867, (14 Stats., 448,) that an appropriation is made "for defraying the expenses of suits in which the United States are concerned, including legal assistance to the Attorney General, and other special and extraordinary expenditures in cases in the Supreme Court of the United States in which the United States are concerned."

I employed Mr. Russell, I repeat, as a counsellor at law, not as district attorney, to assist me as Attorney General in the argument of this case in the Supreme Court of the United States; and I feel perfectly clear that I had authority so to employ him, and that he is entitled to his compensation as such retained counsellor, and that it has nothing whatever to do with his official services or official fees and emoluments as district attorney proper. I respectfully request that you will reconsider the conclusion to which you have arrived, for I feel that Mr. Russell has rendered most valuable services to the Government, and that his compensation is reasonable.

The maximum compensation of $6,000, provided in the act of 1853, in my judgment, has no reference whatever to this case. In that connection, I beg leave to refer you to

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the case of Converse *vs.* United States, (21 How., 463.) So much for the case of Mr. Russell.

As to the general question upon which you ask my opinion, that is to say, whether it is the duty of a district attorney of the United States to embrace in his emolument return all the fees and emoluments which he receives from the United States, I have to say, that, as a general proposition, he must embrace them in his official accounts. But there may be cases, in which a district attorney appears at the request of a head of a department, where the question might arise, whether the compensation which has been agreed upon shall be brought within his account of fees and emoluments, and be limited by the maximum of $6,000.

Mr. Attorney General Cushing (7 Opinions, 86) seems to have been of opinion, that where the district attorney appears, at the request of the head of a department, to render professional service in the *State* courts, he is entitled to compensation according to the nature of the business, and at the charge of the funds of the department which employs him.

He enumerates other cases in which such extra compensation may be allowed to the district attorney.

Inasmuch, therefore, as an answer to the general question may not cover all the cases which may arise, I deem it safest to defer further inquiry until a case shall arise.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. O. H. BROWNING,

Secretary of the Interior.

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THE LEVIATHAN—MILITARY SALVAGE.

1. The general English doctrine is, that salvage is not due to a national vessel for service performed in recapturing from the enemy another vessel employed in the public service.
2. The statutes of the United States make no distinction between the recapture by a public armed vessel of the United States, and recapture by a private vessel of the United States; and, in case of the recapture of a public vessel by another public vessel, the salvage, costs, and expenses are payable from the Treasury.

ATTORNEY GENERAL'S OFFICE,
October 24, 1867.

SIR: I have had under consideration your letter of September 30, and the papers enclosed in it, relating to the case of the United States against the steamer Leviathan.

The facts appear to be as follows: The steamer Leviathan, a public vessel belonging to the quartermaster's department of the army, was captured by a party of rebels about the 20th of September, 1863, while she was lying in the Mississippi river.

The captors ran out to sea with her, hoisting the Confederate flag. She was subsequently recaptured by the United States naval gunboat De Soto and the United States chartered armed transport Crescent, and brought into the port of New Orleans for adjudication. I find that the decree of the district court, rendered on the 10th of January, 1867, restored the vessel to the Government, and awarded salvage to each of the recapturing vessels of $7,500. You request me to instruct the United States district attorney for the district of Louisiana "to institute the proper proceedings for an appeal of the case to the Supreme Court, if in [my] judgment such appeal ought to be made, and it be not too late."

1. The provision of the statute in reference to appeals in prize causes, from the district court to the Supreme Court, is, that the appeal "shall be made within thirty days from the rendering of the decree appealed from, unless the

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court shall previously have extended the time, for cause shown in the particular case." As the time for appeal has long since elapsed, and there is nothing in the papers showing an extension of the time, it is now too late to take an appeal.

2. But upon the merits of the case I can see no ground for advising an appeal, even if the time had not elapsed.

The question arises upon a doubt suggested by the acting Quartermaster General and the Judge Advocate General, that salvage was not properly allowable in this case, because the recapture was made by public vessels of the United States of a public vessel which had been theretofore captured by the rebels.

It has undoubtedly been held in the English courts, that salvage is not due to a national vessel for the service performed in recapturing from the enemy another vessel employed in the public service; and this rests upon the ground, that the performance of such a service is in the direct line of duty of national vessels, and has been assimilated to the service rendered by one ship of war to another in battle.

But our legislation upon the subject of prize does not recognize this distinction. In all cases of capture of vessels that belonged to the United States the statutes provide that they shall be restored to the United States, and that there shall be paid from the Treasury of the United States the salvage, costs, and expenses ordered by the court.

At one time our statutes distinguished as to the amount of salvage payable to the recaptors of a United States vessel, giving one moiety as salvage in all cases where the recapture was made by a private vessel of the United States, and one-fourth of the value when the recapture was made by a public armed vessel of the United States.

But this distinction is now abolished, and all cases of recapture put upon the same footing. With the views which I entertain in this case, I should have no expectation, if an appeal were allowed, that the decree of the

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district court would be reversed, and in a late case the Supreme Court of the United States admonished counsel that an appeal "should never be prayed without some expectation of reversal."

As at present advised, I do not feel authorized to direct this appeal.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

General U. S. GRANT,
Secretary of War ad interim.

DISTRIBUTION OF CUSTOMS FORFEITURES.

1. Under the act of March 2, 1867, providing for the distribution of fines, penalties, and forfeitures incurred under the customs laws, an officer who actually makes a seizure, in consequence of orders from the collector, naval officer, or surveyor, is entitled to the compensation provided by the statute.
2. In a case where there is neither an informer nor a seizing officer entitled to share, distribution should be made according to the first clause of the 91st section of the act of March 2, 1799.

ATTORNEY GENERAL'S OFFICE,
October 29, 1867.

SIR: I have examined the questions submitted for my opinion in your respective letters of August 6 and August 13, 1867. The questions submitted in your letter of August 6 are thus stated: "First, Is a collector, naval officer, or surveyor, who orders a seizure, entitled (there being no informer) to one-fourth of the net proceeds, as the officer making the seizure, in addition to the share which he receives by virtue of his office? Second, If he has no such right, is the officer who, acting under his orders, makes the seizure by virtue and in consequence of those orders, entitled to share as 'the officer making the seizure.'"

The act of March 2, 1867, (14 Stats., 546,) provides, that the net proceeds of fines, penalties, and forfeitures, incurred under the provisions of the law relating to customs,

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shall be paid into the Treasury of the United States, and be distributed under the direction of the Secretary of the Treasury, in the following manner, to wit: "One-half to the United States; one-fourth to the person giving the information which has led to the seizure, or to the recovery of the fine or penalty; and, if there be no informer other than the collector, naval officer, or surveyor, then to the officer making the seizure; and the remaining one-fourth to be equally divided between the collector, naval officer, and surveyor, or such of them as are appointed for the district in which the seizure has been made or the fine or penalty incurred; or, if there be only a collector, then to such collector."

The two questions may very well be resolved into one statement, as follows: Where a seizure is made by an officer authorized to make the seizure, acting under the orders of the collector to make the seizure, there being no informer other than the collector, naval officer, or surveyor, who, under these circumstances, shall be considered the officer making the seizure, within the meaning of the statute, the collector who gives the order to make the seizure, or the officer who executes the order? The question is not clear of difficulty, but, after the fullest consideration which I have been able to give to it, I have come to the conclusion, that the officer who executes the order and actually makes the seizure is the one entitled to the compensation provided by the statute.

Prior to the passage of this act, the distribution of such funds was made, as to parties other than the United States, between two classes, viz: the collector, naval officer, and surveyor, as one class, and the party upon whose information the seizure or forfeiture arose, being the other class.

Prior to the act of 1867, no provision was made for the party who simply ordered the seizure, or merely made the seizure. It was not the seizure alone that gave the right, but the knowledge or information that led to the seizure. From the first, the naval officer and surveyor, and, since the act of 1867, all the three customs officers, have studi-

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ously been denied the right to participate on the footing of an informer. Although they or either of them may have acquired the knowledge or information upon which a seizure was made, nothing can be distributed to them as a reward for such knowledge or information. The statute of 1867, as I have said, provides for the share of an informer; and when there is no informer other than one of these principal officers, whilst it does not give to them or either of them anything upon the footing of such information, it gives the equivalent of an informer's share to the officer making the seizure.

Now, each of these officers is himself authorized to make a seizure; and if he does make it, I can see no reason why he should not come within the provisions of this statute, and take a fourth, in the character of an officer making the seizure. But if, instead of actually making the seizure himself, having information and knowledge as to the property to be seized, he communicates that knowledge to his subordinate officer, and orders him to make the seizure, I am of opinion that the subordinate officer ordered to perform this duty, and who does perform it, stands within the meaning of this law as "the officer making the seizure." Ordering or directing a seizure to be made is quite a different thing from an actual seizure.

By the provisions of the act of 1799, the officers of the customs, whose duty it is to make seizures, are collectors, naval officers, surveyors, the deputies of each of these, and inspectors; and now, by the 2d section of the act of July 18, 1866, the same duty is devolved upon the following officers, in addition to those above mentioned, viz, occasional inspectors, officers of a revenue cutter, an authorized agent of the Treasury Department, and any other person specially appointed for the purpose in writing by a collector, naval officer, or surveyor.

All these officers stand upon the same footing of authority and duty in reference to seizures under the revenue laws.

It follows from this, that one of these officers who makes

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a seizure, under an order from a collector, does not act simply as the agent of the collector, but acts as an officer, under authority conferred upon him by law. He does not stand in such relation to the collector as a mere agent stands to his principal, where the act of the agent is to be considered the act of the principal, and where the thing done is considered as being done by the principal.

When the collector has acquired information by which a seizure may be made, he is excluded, by express enactment, from any reward in consequence of having acquired such information. But he would fail in his duty to be passive after such information had been received, and he must either make the seizure himself, (in which event, as I have said, he would be entitled to the fourth in question,) or he must impart this information to some other officer, whose duty it would then be to make the seizure, and to exercise all the vigilance and incur all the risks that might be incident to the performance of the duty.

If it be said that a collector, who by his vigilance acquires information which leads to a seizure, and who follows up that information by an order to a subordinate officer to make the seizure, should receive a compensation, the answer is, that for all that his compensation is limited to his share of the one-fourth part distributable to him as such collector.

To earn a right to any further compensation, provided for the officer who actually makes the seizure, he must perform that duty himself. He cannot devolve it upon another and take the reward himself. I have said before, that an order to make a seizure is not a seizure either in law or in fact. There must be an actual possession acquired of the *res*, and until this is accomplished no seizure is made. It may happen, and often does happen, that great vigilance and much labor and peril are incurred in effecting a seizure, and it is on this ground, no doubt, that the reward or compensation is given by the statute. In other words, it is a reward for personal service and hazard, and as such properly belongs to the party who

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performs the service and runs the risk. This person, in my judgment, is the officer who makes the seizure, and not the officer who orders it to be made.

I now proceed to consider the two remaining questions submitted in yours of the 13th of August, which are thus stated: "Third, In a case where there is neither an informer nor a seizing officer entitled to share, should the fourth, which would otherwise belong to one or other of these parties, be divided as directed by section 91 of the act of March 2, 1799, the later law making no provision for such a case? Fourth, If so, should the whole fourth be divided between the collector, naval officer, and surveyor, or should it be treated as an entire forfeiture would be under the act of 1799, and distributed one-half to the United States and one-half to the three above-mentioned officers?"

I find no difficulty in answering these questions. In the case stated in the third question, distribution would be made according to the first clause of the 91st section of the act of 1799.

That first clause, or what may be called the first distribution provided by the section, is yet in force, and the entire forfeiture or subject of distribution, after making the deductions required by the 1st section of the act of 1867, is apportionable as follows: One moiety to the United States, the other moiety to the custom-house officers, that is, the collector, naval officer, and surveyor of the district where the forfeiture shall have been incurred, or such of them as may be in said district.

The answer given to the third question, as you will see, covers also the fourth question.

I am, sir, very respectfully,

Your obedient servant

HENRY STANBERY.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

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PAY OF RETIRED NAVAL OFFICERS.

The previous opinions on this subject, of May 18, 1867, and August 1, 1868, (*supra*, pp. 138, 222,) reconsidered and reaffirmed.

ATTORNEY GENERAL'S OFFICE,
October 31, 1867.

SIR: I have had under consideration your letter of the 13th ultimo, in which you call my attention again to certain questions as to the pay of officers on the retired list of the navy. I gave you my opinion upon these questions on the 18th of May, 1867. On the 25th of July, you requested a review of the opinion so given, and, in my absence, your request was complied with by the acting Attorney General, in an opinion furnished on the 1st of August, 1867. You now ask me to review the whole subject, and to give you a "decided opinion."

In conformity with your request, I have again carefully gone over all the statutes and reconsidered the entire subject, and the result is, that I see no cause to change the opinion which was given you on the 18th of May.

Without detaining you by a recital of the various acts of Congress on this subject, and without again going over the grounds stated in the former opinion, I will confine myself to a few additional observations. Prior to the act of 1861, the pay of retired officers was leave of absence pay, or furlough pay, according to circumstances.

There is no question that the provision as to leave of absence pay, though not expressly repealed or referred to in the act of 1861, was yet necessarily superseded by the provisions of that act. The same would have been the consequence as to furlough pay, but for the particular clause in the act of 1861 continuing it in certain cases. But now, by the act of 1862, a new and uniform rule for the pay of retired officers is adopted, which supersedes furlough pay just as effectually as the act of 1861 superseded leave-of-absence pay. It is a new provision upon

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the subject of pay, without any exception or limitation, and covers all the cases to which it applies.

The reference you make to another opinion from this office, in regard to repeals by implication, and in which such repeal is held not to take effect, has no application to this question.

That involved the construction of an act of special character, determining the pay of a particular officer, with an act of general character fixing the pay of certain grades of officers. In that case there was no difficulty in holding, although the rates of pay were different, that yet there was no inconsistency between the two acts and no repeal by implication. But the acts now under consideration are all in *pari materia*, regulating the same subjects.

One rate of pay, called furlough pay, is provided in one act for one class of retired officers, and an entirely different rate of pay was fixed by a subsequent act for various classes of retired officers. So far, therefore, as the class of retired officers, put by the prior act upon the footing of furlough pay, are embraced within the classes provided for in the act of 1862, they are to receive pay according to the act of 1862, and not furlough pay according to the prior act. As to officers of other grades or classes than those designated in the act of 1862, their pay is still left under the regulation of the former law.

I beg to refer you, in this connection, to an opinion given to you by one of my predecessors, Mr. Bates, on the 5th of September, 1862. After reciting the 22d section of the act of July 16, 1862, Mr. Bates says: "This section is general in its terms, and, consequently, general in its operation, and conforms to the gradations of rank established in the navy by the 1st section, embracing all the officers named except midshipmen. In my opinion, it fixes the rate of pay for all the retired officers of the navy it enumerates, according to their rank at the time it became a law. It in effect repeals the prohibition referred to in the 4th section of the act of 16th January, 1857, by giving to officers who have been promoted on the retired list prior

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to its passage the pay of the rank they held at the time of its passage."

Now, although Mr. Bates makes no reference to furlough pay in this opinion, yet what he says necessarily excludes the idea of any other pay for retired officers designated in the section than that which is therein fixed for the respective grades.

His language is, "it fixes the rate of pay for all the retired officers of the navy it enumerates." The clear meaning is, that if the pay of any one of these officers had been furlough pay, such officer must receive in lieu of furlough pay the rate of pay fixed for his grade by this statute.

Take now the case of a captain on the retired list. Prior to the act of 1862, he received furlough pay; but the act of 1862, fixing the annual pay of retired naval officers, gives to captains on the retired list annual pay of $1,600.

It makes no discrimination between such captains as theretofore stood on furlough pay, or upon leave-of-absence pay, or upon any other rate of pay fixed by prior laws. And, where the law has made no exception, you cannot by construction properly make an exception. Both these provisions, as to a retired captain who has been upon furlough pay, cannot have effect. They are wholly inconsistent, and the consequence is, that the last provision takes the place of the former, and furnishes the only rule for the pay of the captain.

You say that you can perceive no more repugnance between the 20th section of the act of July 16, 1862, and the 23d section of the act of August 3, 1861, than between the 22d and 23d sections of the act of August 3, 1861.

The rule of construction, which is applicable to these two sections of the act of 1861, is very clear. Take the case of a captain as an illustration. By the 22d section, a captain's pay is to be $1,300, but by the 23d section a captain retired under its provisions is to receive furlough pay. In construing these two sections, we must give effect to both; for here the legislature, establishing a captain's pay at $1,300, specially excepts the case of a captain retired on

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furlough pay, and gives him furlough pay instead of the fixed rate of $1,300, which is to apply to all other captains.

But when we come to consider the act of 1862, we find a new rate of pay established for certain retired naval officers, and which gives to captains $1,600, and further provides, that no rations shall be allowed to any officers of the navy on the retired list. This is a new enactment on the subject-matter of the pay of retired naval officers.

It changes the rate of pay of the officers enumerated as established in the act of 1861. It covers the whole subject of the pay of the officers enumerated, and of rations, and makes no exception or provision as to furlough pay in reference to these enumerated grades.

This act of 1862 ignores furlough pay precisely as the act of 1861 ignores leave-of-absence pay as to the officers enumerated in that act. It is true there is no express repeal of furlough pay as to these enumerated officers, nor was there any such express repeal of leave-of-absence pay in the act of 1861.

The same thing may be said generally of various acts, in reference to retired naval officers, that the subsequent acts, which make important changes, do not in general contain any express repeals of former provisions.

You further suggest that, if the act of July 16, 1862, repeals the provision as to furlough pay, it must also repeal the rate of pay given to retired officers, as fixed by the 5th section of the act of June 1, 1860, when called to perform active duty. I see no repugnancy whatever between the act of 1860 and that of 1862, as to pay when in active service.

The language of the act of 1860 is as follows: "And officers on the reserved list, when called into active service, shall receive the pay of their respective grades, as herein provided, during the term of such service." Now, the act of 1862 provides pay simply for certain retired officers. It fixes the rule for retired pay. It does not touch or purport to touch the additional pay given to a retired officer called into active service, but leaves that

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additional compensation for that additional duty to stand upon the former law. One is a provision for the officer in retirement, the other an additional provision for the officer when in active service. For the time being a retired officer called into active service is taken out of retirement, and the compensation fixed for the retired list would be no proper compensation for him while in active service, and consequently the statutes must be understood as making a special distinction between such cases.

I see no sort of inconsistency between these acts. They may both very well stand together, and that being the case, there is no necessity to resort to the doctrine of implied repeal. They relate to two different subjects-matter: one fixes the pay of a retired officer when called into active service, and the other fixes the pay of a retired officer when not in active service.

The case of Commodore McCauley.—A question distinct in some respects from those which have been above considered arises in the case of Commodore McCauley. The facts in his case are thus stated in your letter of August 17: "Commodore McCauley, while holding the rank of captain, was retired December 21, 1861, by the operation of the law of that date, at which date the pay of a captain on the retired list, not retired on furlough pay, was his leave-of-absence pay of $3,000 per annum.

"Subsequently the pay of a captain on the retired list was reduced by the act of July 16, 1862, to $1,600 per annum. Commodore McCauley was promoted to his present grade on the retired list March 12, 1867, in conformity with the 9th section of the act of March 2, 1867, which provides, 'That officers on the retired and reserved lists of the navy shall be entitled to promotion as their several dates upon the active list are promoted; but such promotion shall not entitle them to any pay beyond that to which they were entitled when retired, unless upon active duty when they shall receive the full pay of their respective grades.'"

The question you submit for my consideration is,

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whether Commodore McCauley is now entitled to $3,000 per annum or $1,600 per annum.

The larger sum is the rate to which he was entitled at the time he was retired; the lesser sum is the rate of pay fixed for retired officers by the law of July 16, 1862.

I have no doubt that Commodore McCauley is not entitled to the leave-of-absence pay of $3,000, which was the rate to which he was entitled at the time he was retired; for, as you say, whilst he was upon the retired list his rate of pay was changed by the act of 1862 to the lower sum of $1,600.

You will observe that the act of March 2, 1867, does not provide affirmatively that, when a retired officer is promoted, he shall receive the original rate of pay to which he was entitled at the time he was retired, but only that by his promotion he shall not be entitled to any additional pay beyond that original pay.

It fixes the rate of retired pay as a maximum, but does not give it as a new rate of pay to which he becomes entitled upon his promotion.

A construction of this act, which would remit Commodore McCauley to his original retired pay of $3,000, would give him as commodore on the retired list a higher rate of compensation than is given to a retired admiral, which could never have been the intention of Congress. Again, such construction, when applied to a retired officer who was a lieutenant at the date of his retirement, and afterwards, by promotion and by the operation of the act of 1862, became entitled to a higher rate of compensation, would, upon promotion under the act of 1867, remit him to a lower rate of pay than that which he enjoyed at the time of his last promotion. It cannot be contended that Congress meant that promotion should work such consequences, and nothing but the most explicit language would warrant a construction leading to such consequences.

But whilst I am of opinion that Commodore McCauley was not entitled to his original retired pay of $3,000, I am very far from reaching the conclusion that his pay as com-

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modore is to remain at $1,600. On the contrary, I am of opinion that upon his promotion he becomes entitled to the pay as commodore fixed by the act of 1862, that is to say, to $1,800.

I think this is very clear from the legislation of Congress upon the promotion and pay of retired officers.

The first provision cuts retired officers entirely off from promotion.

The next act provides that these retired officers might be promoted by and with the advice and consent of the Senate, and that such promotion should not entitle them to any additional pay.

Next, by the act of 1862, as it has been construed by my predecessor, Mr. Bates, and myself, the pay, as fixed for retired officers, was wholly unaffected by the prior prohibition as to additional pay upon promotion. In other words, one holding the grade of captain on the retired list at that time by promotion, although originally retired with the grade of lieutenant, became entitled to captain's pay just as fully as if he had been retired with the grade of captain. If, therefore, Commodore McCauley, having been retired as a captain in 1861, had been promoted to the rank of commodore before the act of 1862, he would have been entitled to pay as commodore under the provisions of that act.

Now, by the act of 1867, there is a new provision as to promotion on the retired list, by which retired officers are "entitled to promotion as their several dates upon the active list are promoted," but such promotion shall not entitle them to additional pay beyond their pay "when retired."

This, in effect, supersedes the prohibition as to promotion contained in the prior law, and contemplates that additional pay may be a consequence of promotion.

Now, as we find by the act of 1862 the pay of all commodores on the retired list is fixed at $1,800, I see no reason why Commodore McCauley is not entitled to that rate of pay now, being a commodore.

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Although, in the opinions heretofore given and above referred to, the question of additional pay consequent upon promotion was confined to the officers on the retired list promoted prior to the act of July 16, 1862, I can now see no reason, especially since the act of March 2, 1867, why the act does not equally apply to officers promoted since the act of 1862.

There is nothing in the language of the act of 1862 which confines its operation to the officers then on the retired list. The provision as to rank is precisely in the same language as the provision as to pay, and that fixes the relative rank between the officers of the navy and the army on the retired list the same as on the active list.

There can be no question that Commodore McCauley, in reference to this relative rank, is now to rank as commodore, although he has been promoted since the act of 1862.

For the same reason, he is now entitled to the pay of commodore, for, as I have said, by the operation of the act of 1867, the absolute prohibition against an increase of pay upon promotion is in effect repealed, if it were not in fact repealed for all purposes by the act of 1862.

My conclusion, therefore, is, that Commodore McCauley is now entitled to the pay fixed for commodore on the retired list, that is to say, to $1,800 per annum.

The case of Commodore McCauley does not require me to give a construction to the phrase "when retired," as used in the act of 1867. A case may arise in which an officer now on the retired list has by promotion become entitled to a rate of pay greater than the rate of pay which belonged to his original grade at the date of retirement. It may happen that such an officer may again be promoted to a still higher grade, and the question would then arise whether he should receive the pay fixed for his new grade, the same being in excess of his original pay at the time of retirement. It is not proper at this time to express any opinion upon that question. All that is necessary to be

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said is, that nothing in this opinion is to be understood as applicable to that question.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. GIDEON WELLES,

Secretary of the Navy.

CASE OF FRANKLIN G. ADAMS.

1. The appointment of an officer, by and with the advice and consent of the Senate, does not of itself confer the office; as the President may withhold the commission, or the delivery of the commission, to the officer.
2. But if the commission be signed and sealed, and the officer be not removable by the President, the President's right over the office no longer exists, according to the decision in the case of Marbury v. Madison.
3. Where the officer belongs to a class removable at any time by the President, the commission, though made out, may be arrested in the office, and the right to the office does not vest.

ATTORNEY GENERAL'S OFFICE,

November 6, 1867.

SIR: The acting Secretary of the Interior, under date of June 12, requested my opinion on the following statement of facts: "Franklin G. Adams, on the 25th day of May, 1866, was appointed agent for the Kickapoo Indians by the President of the United States, by and with the advice and consent of the Senate, and was commissioned as such agent for the term of four years from the 24th day of May, 1866, unless such commission should be sooner revoked by the President for the time being. Mr. Adams took the oath prescribed by law, gave the required bond, and entered upon the duties of the office.

"On the 10th day of November, 1866, a commission was signed by the President, and sealed with the seal of this department, appointing Nathan Price agent for these Indians. A blank bond and a form of the official oath were sent to him, and the Indian bureau advised him that

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when he duly executed and returned the same his commission would be forwarded to him. He did so; but the commission was not delivered or transmitted to him.

"He never discharged any duty as such agent, nor does it appear that he asserted a title to the office. The nomination of Mr. Price was sent to the Senate, and rejected on the 2d day of March last. Mr. Adams was never notified by this department or the Indian bureau of the temporary commission to Price, so signed and sealed, or of the nomination of the latter, and is now acting under his appointment."

Upon these facts the acting Secretary submits the following question for my opinion: "Is Mr. Adams lawfully acting as agent of the Kickapoos, and should he be recognized as such by the Indian bureau?"

If Price became fully invested with a temporary appointment, it is apparent that Adams was out by removal, and has not been reinstated. Price's nomination and rejection would not have amounted of itself to a removal of Adams. (4 Opinions, p. 32.)

The whole question, therefore, turns upon the temporary appointment. Was Price under that temporary appointment invested with the office?

There was no express removal of Adams. It would only arise impliedly upon vesting of the office in Price. Price was appointed, notified of the appointment, gave bond, and took the oath; his commission was made out, but retained, and he never entered upon the duties of the office.

In the case of Marbury *v.* Madison, (1 Cranch, 50,) the Supreme Court held, that, as to an officer who is not removable by the President, the signing and sealing of a commission vested the office irrevocably in the officer, although the commission had never been delivered to him. But the court say: "Where an officer is removable at the will of the Executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable, and the commission may be arrested if still in the office."

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It is very certain that the appointment of an officer by the President, by and with the advice and consent of the Senate, does not of itself confer the office.

The President has, notwithstanding, a *locus penitentiæ*, and may withhold the commission, or the delivery of the commission, to the officer. But if the commission be signed and sealed, and the office be of a character not removable by the President, in that case the President's right over the office no longer exists, according to the Supreme Court, for the right is vested, and is irrevocable.

But where, as in this case, the officer belongs to a class removable at any time by the President, there it would seem that the commission, though made out, may be arrested in the office, and the right to the office does not vest.

The effect is a revocation of the appointment; not a removal, but the exercise of the right of the President to stop it before the office vests in the appointee.

I am accordingly of opinion, that, as Mr. Adams has neither been expressly removed nor impliedly removed by the action taken in regard to Mr. Price, he is lawfully in the exercise of the duties of the office.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. O. H. Browning,

Secretary of the Interior.

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TAYLOR'S CASE—TENURE-OF-OFFICE ACT.

Where a person was appointed deputy postmaster, under a temporary commission, issued on October 26, 1866, and he was afterwards rejected by the Senate, before the passage of the tenure-of-office act of March 2, 1867, and no confirmation was had of a successor until March 2, 1867, who took possession of the office on April 14, 1867, it was *held*, that he was entitled, under the tenure-of-office act, to compensation for the whole of that period, and to the time when his successor took charge of the office.

ATTORNEY GENERAL'S OFFICE,
November 21, 1867.

SIR: I have considered the questions arising in the office of the Auditor of the Treasury for the Post Office Department, which you have referred for my opinion on the following facts:

"Samuel R. Taylor was appointed postmaster at Oswego, New York, by the President, on the 26th of October, 1866, 'to continue during the pleasure of the President of the United States, or until the close of the next session of the Senate of the United States, and no longer.' Mr. Taylor was rejected by the Senate on the 21st of February, 1867, before the passage of the tenure-of-office bill, and no successor was appointed until the 2d day of March, 1867, when D. W. Irwin was confirmed by the Senate as postmaster at Oswego, and took possession of the office April 14, 1867. Mr. Taylor remained in charge of the office until his successor relieved him, under the following regulation of the department:

"'SEC. 28. A postmaster is responsible for the discharge, by himself or his assistant, of all the duties of the office, until his successor shall have been appointed and qualified, even although the term for which he shall have been appointed has expired.'

"Mr. Taylor has rendered the quarterly account for the quarter ending March 31, 1867. Is he, under the 'tenure-of-office bill,' entitled to compensation for the whole of that period, and to the time when his successor took charge of the office?"

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The act of March 3, 1825, (4 Stats., 103,) requires, that the bond to be given by the deputy postmaster shall be conditioned "for the faithful discharge of all the duties of such postmaster required by law, or which may be required by any instruction or general rule for the government of the department."

The oath required to be taken by the deputy postmaster is to perform faithfully all the duties required of him.

The regulation which has been copied above, and which, I understand, has been in force for more than half a century, is one which undoubtedly the Postmaster General had authority to make, and which deputy postmasters were bound to obey. (United States *vs.* Roberts *et al.*, 9 How., 518.) Such was the state of the law at the time of the passage of the "tenure-of-office bill," on the 2d of March, 1867.

As the law then stood, the temporary appointment of Mr. Taylor not having been confirmed by the Senate, it was his duty to remain in possession of the office, after the termination of his appointment, until his successor had been appointed and qualified.

The 1st section of that act provides, "That every person holding any civil office, to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been, in like manner, appointed and duly qualified."

It is clear that nothing in this section touches the case of Mr. Taylor. It embraces only two classes of officers: those appointed by and with the advice and consent of the Senate, which was not Mr. Taylor's case, and those that should be appointed *after* the passage of the law. As has been stated, Mr. Taylor was appointed *before* the passage of the law.

The 3d section provides, "That the President shall have power to fill all vacancies which may happen during the recess of the Senate, by reason of death or resignation, by

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granting commissions which shall expire at the end of their next session thereafter." Thus far section 3 gives the President no new power of appointment, and introduces no new rule for the tenure of office. The provision of the Constitution is, that the President may fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

The section next proceeds as follows: "And if no appointment, by and with the advice of the Senate, shall be made to such office so vacant or temporarily filled as aforesaid during such next session of the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office."

In this case, however, an appointment to the office held by Mr. Taylor was made by and with the advice and consent of the Senate at its session next after Taylor's appointment was made. So that the duties of this office were never in abeyance.

Section 5 provides, "That if any person shall, contrary to the provisions of this act, accept any appointment to or employment in any office, or shall hold or exercise, or attempt to hold or exercise, any such office or employment, he shall be deemed, and is hereby declared to be, guilty of a high misdemeanor," etc. Again, by the 6th section an employment in any office, or the exercise of the duties of any office, contrary to the provisions of the act, is declared a high misdemeanor.

And by the 9th section it is provided, "That no money shall be paid or received from the Treasury, or paid or received from or retained out of any public moneys or funds of the United States, whether in the Treasury or

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not, to, or by, or for, the benefit of any person appointed to, or authorized to act in, or holding or exercising, the duties or functions of any office, contrary to the provisions of this act; nor shall any claim, account, voucher, order, certificate, warrant, or other instrument, providing for or relating to such payment, receipt, or retention, be presented, passed, allowed, approved, certified, or paid, by any officer of the United States, or by any person exercising the functions or performing the duties of any office or place of trust under the United States, for or in respect to such office, or the exercising or performing the functions or duties thereof; and every person who shall violate any of the provisions of this section shall be deemed guilty of a high misdemeanor, and, upon trial and conviction thereof, shall be punished therefor by a fine not exceeding $10,000, or by imprisonment not exceeding ten years, or both said punishments, in the discretion of the court."

This, as will be perceived, is a highly penal statute, and it must, by the ordinary rules of construction, be confined to the very cases to which it clearly applies. Mr. Taylor has, since the statute went into operation, exercised the duties appertaining to the office of a deputy postmaster, but not in consequence of any new appointment or new employment, but in virtue of his original appointment, made before the passage of the act, and in performance of a duty imposed upon him under that original and temporary appointment; nor is there anything in this act "contrary" to the exercise of such official duty.

If, at the session of the Senate next after his appointment, no appointment, by and with the advice and consent of the Senate, had been made to the office which he then held, that office, on the 4th of March, 1867, when that session of the Senate terminated, would have been "in abeyance," without any salary, fees, or emoluments attached thereto, and, in that condition of things, the duties could not have been performed by him. It happened, however, that, on the 2d day of March, two days before the session

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closed, on the same day that this act was passed, the President nominated Mr. Irwin as postmaster of Oswego, and this nomination was confirmed by the Senate.

This office, therefore, was never "in abeyance," within the contemplation of the act, and the exercise of its duties by Mr. Taylor was not contrary to any of the provisions of the act.

The scope and intent of the tenure-of-office act are clearly these: First, to take from the President the power of removing any officer without the consent of the Senate. This applies to offices which are not vacant. Second, that in case of appointment to offices where a vacancy happens in the recess of the Senate, by death or resignation, to insure the filling of the office and appointment during the session, with the consent of the Senate, by declaring that, if the office is not so filled during the session, it shall be in abeyance, by making it penal, under such circumstances, in the person holding the temporary appointment, to continue in the exercise of its duties, or in any other person to act under an appointment or employment of the President, or any other officer, excepting only such person, other than the temporary appointee, as may by law be authorized to discharge its duties in case of vacancy.

The mischief to be provided against is the continuance of the office in the hands of the President's appointee, when there has been a failure, during the session of the Senate, to appoint an officer with the consent of the Senate. In my opinion, the exercise of the duties of this office by Mr. Taylor, after the end of the session, under the regulations of the Postmaster General, until the person appointed with the consent of the Senate entered upon the office, was not contrary either to the letter or the spirit of the tenure-of-office act.

I am accordingly of opinion, that he is entitled to compensation until the time when his successor took charge of the office.

In the consideration of this case, I have taken it for granted that, as to the exercise of the office after the 2d

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of March was concerned, it fell within the provisions of the act. Proceeding upon that assumption, there was a clear ground upon which his right to exercise the office, after the termination of the session, could be placed, that is to say, that the office was not in abeyance.

This renders it unnecessary that I should consider another question, and that is, whether, as to appointments (and the exercise of office under appointments) made prior to its passage, that act is in operation. This question arises, and will now be considered, in the case of Richard Beahan.

The case of Richard Beahan.—He was appointed deputy postmaster of Ann Arbor, Michigan, on the 19th of September, 1866, during the recess of the Senate.

He was rejected by the Senate on the 19th of March, 1867. On the 8th of April, 1867, Claudius B. Grant was appointed, by and with the advice and consent of the Senate, to the same office. Beahan exercised the duties of the office until his successor was qualified, and has rendered a quarterly account to March 31, 1867, and claims compensation up to that period.

The point of difference between this case and that of Taylor is, that the office was not filled by the consent of the Senate at the session next succeeding the appointment, and which terminated on the 4th of March. If, therefore, the case of Beahan comes within the operation of the tenure-of-office act, the office fell into abeyance when that session ended, and the penal provisions against its further exercise by Beahan took effect.

Upon a careful examination of the provisions of that act, I have come to the conclusion, that it must be construed to apply only to cases where the appointment has been made *after* the law took effect. It is clear that, as to appointments during a recess of the Senate, this act is prospective. It provides a *new rule*, by limiting the appointing power to vacancies happening by death or resignation, and does not apply to appointments theretofore made. No appointment made *before* the passage of the act can be said

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to be contrary to, or forbidden by, the act. The act, however, forbids two things: first, an appointment contrary to the terms of the statute; and, next, the acceptance of such prohibited appointment and the exercise of the office under it.

Again, as to an appointment made in the recess to a vacancy occasioned by the death or resignation, that is not forbidden: but the continuing to exercise the duties under such appointment, after the office is in abeyance, is forbidden. The exercise of the duties of the office here intended must be under an appointment made *after* the law took effect. If the appointment should be made contrary to the law, then any exercise of the office is contrary to the law; or, if the appointment should be made in conformity with the law, then the exercise of the office is only forbidden *after abeyance.*

Everything hinges upon an appointment to be made *after* the law takes effect, and all the penal consequences arising directly upon the appointment, or subsequently, relate to such future appointment. Inasmuch as Beahan was appointed before the law was passed, and has continued to act under that appointment, I do not think he comes within its purview, and that his accounts must be settled upon the same basis as those of Taylor.

It would require the plainest language to satisfy me that Congress intended, on the 2d of March, 1867, to involve all officers in its penalties holding by lawful appointments theretofore made. These officers, scattered all over the United States, could not have notice of this law two days after its passage. They would continue to exercise the duties according to their official bonds and the regulation of the department until a successor should be qualified. I find no language in this act which requires me to place a construction upon it leading to such unjust consequences.

I therefore conclude, that all the provisions of this act are prospective, and must be confined to appointments

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thereafter to be made, and to the exercise of the official duties under such appointments.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

HON. HUGH MCCULLOCH,
Secretary of the Treasury.

DISTRIBUTION OF HEAD-MONEY.

The ascertainment and distribution of bounty or head-money for the destruction of armed enemy vessels, by naval vessels of the United States, are subjects of judicial cognizance by the admiralty courts of the United States; and proceedings to that end, in the district court of the District of Columbia, are regular and valid, and afford all proper protection to the interests of the Government.

ATTORNEY GENERAL'S OFFICE,
November 23, 1867.

SIR: I have considered the questions referred to me by your letter of the 15th instant, upon proceedings in admiralty pending in the Supreme Court of the District of Columbia, holding a district court of the United States, in reference to the distribution of bounty moneys due for the destruction of certain armed vessels of the enemy destroyed during the late rebellion by naval vessels of the United States.

In reply to an inquiry I addressed to the district attorney of this District, he reports as follows:

"I beg leave to state, that the proceedings therein referred to have been instituted by me, at the request of the Secretary of the Navy, (under the direction of whom the proceedings are placed by statutory enactment,) for the purpose of obtaining the just and legal distribution of the moneys due for the destruction of the armed enemy vessels named in the communication of the honorable Secretary of the Treasury. The proceedings are on the admiralty side of the court, and the cases are reported as prize cases

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to the proper department." He adds, that these cases were submitted by the Secretary of the Navy to the prize court of this District. He considers, "as it was represented by the special counsel of the department, who appeared before the court, that the prize court was the proper tribunal to decide and adjudicate upon questions of law and fact incident to the claims of those who claimed bounty-money."

The form of proceeding in the suit, it appears, was by petition, presented by the commander of each vessel claiming the bounty, setting forth the facts in each case, and the law relied upon, the names of the vessels composing the attacking force, etc. Upon the filing of these petitions, monitions in the usual form were issued, that all persons interested might have an opportunity to intervene for the protection of their interests; proof was taken of the necessary facts, and finally decrees were passed, finding certain moneys due to the officers and crews of certain vessels, precisely as decrees are passed in prize cases; and, the cases having been reported to the Secretary of the Navy and to the Solicitor of the Treasury, the money was distributed as prize-money. The cases now pending are precisely of the same character; and in these, monitions also have been issued and proof taken, and decrees are to be passed and reported to the Secretary of the Navy and the Solicitor of the Treasury, as required by law.

You call my attention to the fact, that, as no property was brought within the jurisdiction of the court, these suits cannot be strictly prize cases. You ask me whether any special action is needed for the protection of the interests of the Government.

The first provision for the payment of bounty-money of this description is contained in "An act for the better government of the navy of the United States," passed April 23, 1800. (2 Stats., 53.) Section 7 of that act is in these words: "That a bounty shall be paid by the United States of $20 for each person on board any ship of an enemy at the commencement of an engagement which shall be sunk

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or destroyed by any ship or vessel belonging to the United States of equal or inferior force, the same to be divided among the officers and crew in the same manner as prize-money." Prize-money was, by the same act, placed under the management of the Secretary of the Navy, the Secretary of the Treasury, and the Secretary of War. I do not find that this provision in the act of Congress has received any judicial construction in the United States.

The next provision upon this subject is found in the "act for the better government of the navy of the United States," passed July 17, 1862. (12 Stats., 606.) The 4th section of this act provides, "That a bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement which shall be sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of $100 if the enemy's vessel was of inferior force, and of $200 if of equal or superior force, to be divided among the officers and crew in the same manner as prize-money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of their class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which shall be immediately destroyed, for the public interest, but not in consequence of injuries received in action, $50 for every person who shall be on board at the time of such capture."

The 9th section of this act provides, "That all ransom-money, salvage, bounty, or proceeds of forfeiture or confiscation, accruing or awarded to any vessel of the navy, shall be distributed and paid to the officers and men entitled thereto, in the same manner as prize-money, under the direction of the Secretary of the Navy."

By the 12th section of this act, it is made the duty of

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district attorneys, in all cases of prize, "to furnish the Navy Department with a complete list of all such cases which have been determined, or may be pending, in their respective districts; and the Secretary of the Navy is authorized to appoint an agent, or to employ counsel in any case in which he may consider it necessary, to assist the district attorneys, and to protect the interests of the captors; and further provides, that whenever a final decree of condemnation, or an interlocutory decree of sale, the proceeds shall be deposited with the assistant treasurer of the United States, and shall remain in the Treasury until final decree of distribution."

The act making appropriations for the naval service, passed May 21, 1864, (13 Stats., 85,) contains the following appropriation: "For bounties for destruction of enemies' vessels, as per 'act of July 17, 1862, for the better government of the navy,' $250,000."

On the 30th of June, 1864, an act was passed "to regulate prize proceedings and the distribution of prize-money, and for other purposes." The 11th section of this act (13 Stats., 310) is exactly identical with sections 4 and 9 of the act of 1862, above quoted. By section 28 of this act of 1864 it is provided, "That in case of any capture heretofore made, or that shall hereafter be made, if, by reason of its condition, or because the whole has been appropriated to the use of the United States, no part of the captured property has been or can be sent in for adjudication, or, if the captured property be entirely lost or destroyed, proceedings for adjudication may be commenced in any district the Secretary of the Navy may designate."

The last provision upon this subject is contained in the act making appropriations for the naval service, passed April 17, 1866. (14 Stats., 37.)

The 2d section of this act provides, "That so much of the 1st section of the act making appropriations for the naval service, approved May 21, 1864, as appropriates $250,000 'for bounties for destruction of enemies' vessels,' * * * be amended, so that said appropriation shall

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apply to all cases of destruction of enemies' vessels, during the recent rebellion, and at the same rate as is provided in the act to which reference is made."

It will be seen, from this review of statutory provisions on the subject of this sort of bounty, that there is no express provision pointing out the manner in which the adjudication of the necessary facts and conditions under which the bounty arises is to be made; nor have I been able to ascertain that the question, as to how and where such adjudication is to be made, has been decided in the United States.

The British statutes, from a very early date, have contained similar provisions. The allowance to ship's companies, by these British statutes, who have destroyed vessels of the enemy, is at the rate of £5 per head; and, although called bounty-money in the acts of Parliament, it is familiarly known as a head-money.

The English statutes which gave this bounty, like our own, do not seem to have made any special provision for the manner of adjudication as to the right. But jurisdiction seems to have been exercised in the British admiralty, by assimilating these cases to those of prize.

It is only necessary to look into the cases in the English admiralty, arising upon these bounty provisions, to see how many nice questions arise in their adjudication. Such, for instance, as, what is an enemy's vessel? and what amounts to a destruction of the vessel? and what should be the rule of distribution where there has been a concurrent action of several vessels in the transaction? Such questions are eminently fitted for adjudication in a prize court.

As I have said, no express provision is made in these statutes for the manner in which the adjudication shall be made; but enough appears to satisfy me that Congress intended such adjudication should be made in admiralty, as in prize cases proper.

As we find in the 9th section of the act of 1862, and in the 11th section of the act of 1864, bounty-money is classed

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with ransom, salvage, and proceeds of condemned property, to be distributed and paid in like manner as prize-money, under the direction of the Secretary of the Navy; and by the 28th section of the act of 1864, proceedings for adjudication are authorized in the case of captured property entirely lost or destroyed.

Jurisdiction in prize cases is, therefore, extended to cases where the property itself is not brought in for adjudication; and I see no reason which distinguishes a vessel destroyed after a capture is complete from that of a vessel destroyed in the attempt to capture it.

I am therefore of opinion, that the proceedings which have been had, and those which are now pending in this District, are regular, and afford all proper protection to the interest of the Government.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

WARREN'S CASE.

1. A person born in Ireland, but naturalized as a citizen of the United States, is not entitled, when arraigned in a British court for the offence of treason-felony, to the privilege of a jury *de mediatate*.
2. That right, being conferred by British law, must, in a British court, be regulated by that law.
3. It is well-established English law, that a native-born subject of Great Britain is not capable of throwing off his allegiance.
4. The statutes of the United States make no provision for trial by jury *de mediatate*.
5. The right to a jury *de mediatate* does not exist at this time in any of the States of the Union.
6. The United States have no right to complain that one of its citizens, indicted for a crime in Great Britain, is not entitled to a privilege not accorded by federal or State law to a subject of Great Britain indicted for crime committed in the United States.

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7. A question as to status or citizenship, arising in the United States, is determinable by our own law; or, if it arose on the high seas, or anywhere out of the jurisdiction or operation of British law, it would be a question either under our own law or the public law, according to the circumstances under which the right was asserted or denied.

ATTORNEY GENERAL'S OFFICE,
November 26, 1867.

SIR: I have had under consideration your letter of the 18th instant, in which you request my opinion upon certain questions which are thus stated:

"1. Whether error was committed on the trial of John Warren.

"2. Whether that error is sufficient to vitiate the judgment of the court.

"3. Whether any legal remedy, and, if so, what legal remedy, can be applied for correcting the error.

"4. Are the United States hindered, prevented, or embarrassed, in seeking such remedy, by the prisoner's dismissing the counsel, attorney, and agent, who had been employed by the United States in his behalf?

"5. How far is the opinion expressed by the presiding judge important in the case, and is it sound law?

"It becomes necessary that I should ask your opinion upon a further point, namely, whether an alien indicted in the United States, and put upon trial for treason-felony in a federal or State court, is entitled to a jury *de mediatate linguæ*, and, if so, what must be the qualifications of the portion of the jurors who are aliens; that is to say, whether such jurors must be persons owing allegiance to the same country of which the accused is a citizen or subject, or whether they are to be merely aliens, without reference to their special allegiance."

The facts upon which these questions arise appear to be as follows:

On the 30th of October last, John Warren was put upon trial before a special commission at Dublin, Ireland, upon an indictment for treason-felony.

Upon being arraigned, Warren plead that, although he

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was born in Ireland, under allegiance to the British crown, he then was, and had been from the 1st day of October, 1866, a citizen of the United States of America by naturalization; for which reason he insisted that he was an alien, and claimed the right as such to be tried by a jury whereof one-half should be natives of the British realm, and the other half aliens from Great Britain, born in the United States of America, and under their allegiance. The court overruled the plea, and directed the trial to proceed before a jury consisting exclusively of British subjects. Warren thereupon directed his counsel to withdraw from the case, declaring that the denial of the right set up "placed him in the hands of the United States Government, which had now become the principal." His counsel and attorney then retired from the case.

Thereupon Mr. Adair, an Irish barrister retained by the United States to attend the trial of American citizens under a charge of treason-felony, to see that, if any errors were committed in such proceedings, the same should be made known to this Government, stated to the court, that he had been instructed to watch the proceedings, and claimed the right to appear in the case under his retainer by the United States, and inquired of the court if he would be justified in appearing. The court answered, that if he was acting as counsel for the prisoner they would not inquire where he got his instructions. If he was not acting for the prisoner, they could not recognize him as counsel, though employed by persons not parties to the record.

Mr. Adair then stated, in the presence of the prisoner, that he was not instructed on behalf of the prisoner; to which the court replied, that his interference as barrister under such circumstances was irregular; upon which Mr. Adair took no further part in the proceedings.

It appears further, by unauthenticated reports in public journals, that a reason given by the court for overruling the plea was, that Warren, having been born a subject of Great Britain, his native allegiance was indefeasible, and

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a naturalization by the United States did not avoid his native allegiance to the British crown nor constitute him an alien.

Warren was convicted, and sentenced to imprisonment for a term of years. I am not prepared to say that any error was committed upon the trial of John Warren. No record of the proceedings or rulings of the court which tried him is before me, and I must confine myself to the statement as to his plea and the overruling of the plea by the court, set forth in the above extract from your letter. If the offence for which he was indicted amounts to treason by the British law, Warren was not entitled to a jury *de mediatate*, for that right has never been extended to trials for treason.

I do not know what are the particular allegations contained in the indictment. All that is stated is, that the offence charged was treason-felony, an offence defined by a British statute, and which seems to be classed with the offence of treason. But however that may be, and whether the offence amounted to treason, or was a mere felony below the grade of treason, it is very clear that the court committed no error by refusing to extend to him the privilege of a jury *de mediatate*. That right, given by statute in England, is confined altogether to aliens. But according to English law, perfectly well established, a native-born citizen of Great Britain does not become an alien by expatriation or abjuration of his allegiance, or by being clothed with a new allegiance in a foreign country.

The question here is not how far this peculiar doctrine of English law is in conformity with public law, or what are the consequences when it comes under consideration in another sovereignty, but the question now is altogether one of English law. The right set up by Warren was a right conferred by British law, and must, therefore, in a British court, be regulated by that law; and it would not be admissible to take the benefit of the right and ignore the exceptions which are established against its exercise.

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I feel very clear, therefore, that no error was committed in refusing Warren a jury *de mediatate.*

This opinion renders any further answer unnecessary to the first five questions propounded in your letter.

The sixth question, upon which you ask my opinion, is, whether an alien, indicted in the United States, and put upon trial for treason-felony in a federal or State court, is entitled to a jury *de mediatate linguæ.* The right of a trial by jury *de mediatate* is not a common-law right. It exists in England by statutory provision. So far as the question concerns federal law, I am clearly of opinion that no such right exists in cases of treason or any other crime. The statutes of the United States make no provision for such a jury. On the contrary, the statutory provision as to juries in the federal courts requires qualifications wholly inconsistent with a jury *de mediatate.*

By the act of June 17, 1862, (12 Stats., 430,) the taking up of arms against the United States is declared to be a disqualification and cause of challenge as to any grand or petit juror in the courts of the United States, and upon the motion of the district attorney each grand and petit juror in any of the courts of the United States is required, among other things, to take an oath that he will support the Constitution of the United States.

The first of these provisions would disqualify an alien who had been engaged in lawful war against the United States waged by his own sovereign; the second is wholly inconsistent with the idea that any alien could be a juryman in contemplation of federal law.

In addition to this, we find in the 1st section of the act of July 20, 1840, (5 Stats., 394,) the following provision: "Jurors to serve in the courts of the United States, in each State respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such State now have or are entitled to, and shall hereafter, from time to time, have and be entitled to." This provision leads at once to the inquiry

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suggested in your question as to any regulation in the courts of the States in regard to a jury *de mediatate* on the trial of an alien.

After much research, I feel safe in saying, that there exists at this time, neither by statutory provision nor by any judicial decision following the common law or any British statute, the right to a jury *de mediatate* in any one of the States of the Union.

I find only three cases upon this subject in the State courts, and these have occurred in three of the original thirteen States, which at one time as colonies were more or less under the operation of British law. The first in order of time is Mesca's case, decided at the September sessions of the court of oyer and terminer, at Philadelphia, A. D. 1783, in which it was held, upon an indictment against four Italians for murder, that they were entitled to a jury *de mediatate*. I find in a note to that case, that, in a subsequent case, the Commonwealth *vs.* De Mora, in the mayor's court at Philadelphia, decided in 1824, a jury *de mediatate* was refused, on the ground that the act of 1805 regulating juries had in effect abolished it.

Next in order of time is the case of The People *vs.* McLean, (2 Johns. Rep., 370,) decided in the court of oyer and terminer, before Mr. Justice Tompkins, of the supreme court of New York, A. D. 1807. In that case, the application for a jury *de mediatate* was allowed. It would seem, from the opinion of the court, that the right to such trial was by mistake founded upon the common law. However that may be, such right, if it ever existed in the State of New York, has long since been abolished by a provision in the Revised Statutes of New York, vol. 2, p. 758, in these words: "No alien shall be entitled to a jury of part aliens or strangers for the trial of any indictment whatever."

The last case in the order of time is that of the State *vs.* Antonio, decided by the supreme court of North Carolina, A. D. 1825. (4 Hawks., 200.) Antonio, being an alien

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indicted for murder, moved for a jury *de mediatate*. The court overruled the motion.

I do not doubt that in some of the original States the provisions of the statute of Edward III, which gave the right to a trial *per mediatatem linguæ*, were held to be in force during their colonial existence. But I repeat, that at this time no such right exists in any State of the Union.

Putting the question next upon the footing of comity, aside from positive law, the United States have no right to complain that one of its citizens, indicted for a crime committed in Great Britain, is not entitled to a privilege which is not accorded by federal law or State law to a subject of Great Britain indicted for a crime committed in the United States. If a citizen of the United States, either natural-born or naturalized, commits a crime in Great Britain, his plea of citizenship is of no avail. Whilst he is in Great Britain, he owes a temporary allegiance to that sovereignty. He owes not only obedience to its criminal laws, but a temporary allegiance, which subjects him to punishment for treason. He is then altogether within the proper domain of British law; and if, as in this case, he insists upon a right founded upon, and peculiar to, British law, he must show himself entitled to the exercise of that right in conformity with that law. This rule clearly applies to the right set up by Warren. The right was not accorded to him, as, by the established law of Great Britain, it was confined to aliens; and, in contemplation of British law, Warren was not an alien.

Limiting myself to the facts of this case, I have no hesitation in saying, that we have here only a question of British law, and that Warren's condition as to alienage or citizenship, for the purposes of this case, is to be fixed by that law alone.

A question as to status or citizenship, if it arose in the United States, would be determined by our own law; or if it arose upon the high seas, or anywhere out of the jurisdiction or operation of British law, then it would be a question either under our own law or by public law, as

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might happen, according to the circumstances under which the right was asserted or denied.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

GILSON'S CASE.

Under the extradition treaty with France, a public officer of the United States, who embezzles moneys of the United States intrusted to his care, and flies from justice to the territory of France, is liable to be removed to this country for trial; such crime being here punishable with infamous punishment.

ATTORNEY GENERAL'S OFFICE,
November 29, 1867.

SIR: I have the honor to acknowledge the receipt of your letter of the 21st of September last, with enclosures.

It appears that in December, 1865, a treasury warrant for $33,000 was issued against the appropriation for legislative expenses for the Territory of Idaho, and placed to the credit of Horace S. Gilson, then secretary of the territory, with the designated depository of the United States at Oregon City. Subsequently, Mr. Gilson drew the entire sum deposited, went to San Francisco, and thence left the United States, without having used any portion of the money for the purpose for which it was advanced to him.

Mr. Baker, one of Gilson's official securities, writes from Paris, under date of September 1, that Gilson was then in Paris, and asks that a requisition be sent for his arrest on the charge of embezzlement.

You transmit with your letter a copy of the extradition treaty with France, and inquire whether the facts in Gilson's case make out the offence of embezzlement, and amount to an infamous crime, pursuant to the laws of the United States. The 11th section of the act of March 3,

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1863, (12 Stats., 813,) entitled, "An act to provide a temporary government for the Territory of Idaho," directs that the amount required to defray the expenses of the legislative assembly, the printing of laws, and other incidental expenses, shall be expended by the secretary of the territory, and that, in the disbursement of the moneys intrusted to him, he shall be governed solely by the instructions of the Secretary of the Treasury, and shall semi-annually account to said Secretary for the manner in which such money shall have been expended.

The 16th section of the act of August 6, 1846, (9 Stats., 63,) requires "all officers and other persons, charged by this act, or any other act, with the safe-keeping, transfer, and disbursement of the public moneys, other than those connected with the Post Office Department," "to keep an accurate entry of each sum received, and of each payment or transfer," and declares, "that if any one of the said officers, or of those connected with the Post Office Department, shall convert to his own use, in any way whatever, or shall use, by way of investment in any kind of property or merchandise, or shall loan, with or without interest, or shall deposit in any bank, or shall exchange for other funds, except as allowed by this act, any portion of the public moneys intrusted to him for safe-keeping, disbursement, transfer, or for any other purpose, every such act shall be deemed and adjudged to be an embezzlement of so much of the said moneys as shall be thus taken, converted, invested, used, loaned, deposited, or exchanged."

The offence is by the same section declared to be a felony, and is punishable by imprisonment for a term of not less than six months nor more than ten years, and a fine equal to the amount of the money embezzled.

Gilson having been charged in his official capacity with the disbursement of this public money, and having absconded with the funds thus placed in his hands, comes within the provisions of the act just quoted.

The second article of the treaty with France of 1843 provides for the extradition of persons charged with

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various crimes and offences, and, among others, "with embezzlement by public officers, when the same is punishable with infamous punishment."

So far as the laws of the United States are concerned, this sort of embezzlement being declared to be a felony, and punished by imprisonment for a term of years, comes within the terms of the treaty.

By the criminal law of France, punishments are divided into two classes: first, corporal and infamous; second, simply infamous. Imprisonment is classed under infamous punishment. So that by the laws of France, as well as of the United States, this case is clearly within the treaty.

By Article I of the treaty, the extradition takes place only "when the fact of the commission of the crime shall be so established, that the laws of the country in which the fugitive or person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed.

I have instructed the district attorney for this district to obtain a warrant for the arrest of Gilson, a copy of which letter I herewith inclose for your information.

Upon receiving the report from the district attorney, I will enclose the necessary documents upon which the requisition may be made.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. WM. H. SEWARD,
Secretary of State.

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HARPER'S FERRY PROPERTY.

The United States have a valid title in fee simple of all their property at Harper's Ferry, West Virginia.

ATTORNEY GENERAL'S OFFICE,
December 5, 1867.

SIR: By a resolution of the House of Representatives, passed March 26, 1867, the Attorney General is directed to examine the title papers concerning the public property at Harper's Ferry, West Virginia, used previous to the rebellion for an armory, and report his opinion as to the title of the United States to the same, "whether it is in fee simple, or merely held in trust by the President for a specific use, and no other."

In conformity with this resolution, I have the honor to submit a carefully-prepared abstract of the title of the United States to the property at Harper's Ferry, and will proceed to give my opinion on the title, especially upon this specific point, whether it is held in fee simple, or held for a single designated use, and no other.

First, as to the question touching the use. This question has no doubt arisen under the deeds of June 15, 1796, and February 20, 1797, numbered respectively "2" and "3" in the abstract.

In the earlier years of the Government, the form of conveyance adopted for real estate acquired by the United States was to convey the land to a public officer and his successor, to hold to the use of the United States.

Following this usage, I find in both these conveyances that the grant was made to "George Washington, President of the United States, and his successors forever," to hold the same "to and for the use and behoof of the said United States forever, and to and for no other use or behoof whatsoever."

Being founded on a money consideration recited in each of these deeds, they operate as deeds of bargain and sale,

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and, under the Virginia statute of uses in force at that date, vested the legal estate in the President and his successors in fee, subject to a trust in favor of the United States of the entire beneficial interest. If no use had been declared, this trust would nevertheless have resulted to the United States, for the purchase-money, as recited in the deeds, was paid on account of, and for and in behalf of, the United States, and, moreover, the grantee takes in his official and not in his individual capacity. (Tucker's Com. on the Laws of Virginia, vol. 1, p. 264, 265.)

The trust or use declared in favor of the United States is not limited to any specific purpose or object.

It imports that the conveyance was to be for the benefit of the United States exclusively. The *habendum* in each of the instruments has precisely the same force and effect as if it had been "to the use of the United States forever." I think this stands clearly enough upon acknowledged principles. I find it, however, expressly recognized in the case of Van Ness *vs.* The City of Washington and the United States, (4 Peters, 284.) I see nothing, in this limitation of uses, in the nature of a condition subsequent, or a use determinable upon a future event.

The use is not merely to possess the property, but carries as well the *jus disponendi* and the right to take the proceeds upon sale.

It is not necessary to inquire here what would have been the effect, if the use had been limited to the United States for the purposes of an armory, or if the United States, under the eminent domain power, had condemned the property for the purpose of erecting an armory. Whatever effect would follow by a conveyance of the legal title to the United States for such a purpose, or from its acquisition by appropriation for such a purpose, would also attach to a conveyance of the legal title to a public officer, with a limitation of the uses to the United States; for the limitations of trusts are to be construed precisely as those of legal estates.

Taking the use as it is declared in these conveyances, I

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entertain no doubt that it is absolute and unconditional. (See Van der Volgen *vs.* Yates, 5 Selden, 219.)

The conveyance marked "No. 1" purports, so far as John Wager, Sr., one of the grantors, is concerned, to be made in execution of the power created by the will of Robert Harper, patentee. I find by the will a life estate devised to Sarah Harper and her husband, with power to either of them "to leave and bequeath the said ferry and lands to them devised as above to either of their sons whom they shall judge most deserving thereof, and, in case of failure of male issue, to leave and give the premises aforesaid to either of their daughters, as may appear to them the most suitable." The will contains no residuary clause, nor is there any devise over in default of appointment under the power given by the will.

At the date of the will and the death of the testator, Sarah Harper was intermarried with John Wager, Sr., and they had three children then living, namely, John Wager, Jr., Margaret Wager, and Mary Wager. John Wager, Sr., survived his wife, and joined with his three children in the conveyance of June 15, 1796. In that conveyance, John Wager, Sr., declares, covenants, and agrees, to and with "the said George Washington, President of the United States, and his successors forever, that he, the said John Wager, Sr., in pursuance of the intent of the last will of Robert Harper, hath elected and appointed his son, the said John Wager, Jr., to take and to have and hold the said parcel of land devised by the last will aforesaid unto the said Sarah Harper, his late wife, who has departed this life without making any devise or appointment thereof, and that he, the said John Wager, Sr., will not make any other appointment or any bequest whatsoever thereof."

This deed also contains covenants of general warranty.

A question might be raised, as to whether the power created by the will was merely a naked power, or coupled with a trust; and, if merely a naked power, whether it was well executed by the deed, or, if not well executed, whether

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it was such a partial execution as might be enforced in equity in favor of the purchaser.

If these questions had been raised in time, they would have been found to be of a very serious character, but I look upon them as having no significance at the present time.

The United States have been in the undisturbed adverse possession of all this property, claiming the absolute ownership, for more than seventy years. Upon examination of the statutes of Virginia, I entertain no doubt that that possession has long since ripened into a perfect title.

I am accordingly of opinion, that the United States now hold a valid title in fee simple of all their property at Harper's Ferry.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. SCHUYLER COLFAX,

Speaker of the House of Representatives.

MILLIKEN'S CASE

A former rebel soldier was arrested in September, 1867, by the military authorities, for an assault in Tennessee upon a private citizen, with a view of putting him on trial by a military commission for violation of his parole given on May 1, 1865. He subsequently sued out a writ of *habeas corpus* before the district judge, who, on full hearing before himself alone, the circuit judge not being present, discharged the prisoner: *Held*, that under the existing statutes there was no mode by which the case could be taken by appeal to the Supreme Court of the United States.

ATTORNEY GENERAL'S OFFICE,

December 17, 1867.

SIR: I have had under consideration the case of W. A. Milliken, submitted for my opinion by your letter of November 21.

It appears that William A. Milliken, formerly a soldier in the rebel service, committed an assault upon a northern

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man, at La Grange, Tennessee, and the military authorities, under orders of General Thomas, commanding the department of the Cumberland, at Louisville, Kentucky, arrested Milliken, and held him in military custody, with a view of putting him on trial by a military commission for a violation of his parole. The terms of Milliken's parole, given on the 1st of May, 1865, are, that he will not take up arms against the Government of the United States until properly released from the obligation of his parole, and he is permitted to return to his home, not to be disturbed by the United States authorities so long as he observes his obligations and obeys the laws in force where he may reside.

Milliken was arrested by the military authorities in September, and shortly thereafter Judge Trigg, of the United States district court of the western district of Tennessee, granted a writ of *habeas corpus* upon his application. The return upon the writ by the officer having him in custody was as follows: "Held as a military prisoner for violation of his parole." On the full hearing of the case, Judge Trigg discharged the prisoner.

The question submitted to me is, whether there is any mode by which this case can be taken to the Supreme Court of the United States.

It appears that when the argument upon the *habeas corpus* was begun, Mr. Justice Swayne, of the Supreme Court of the United States, was on the bench with the district judge, but left the court whilst the case was in progress. If he had remained, and a difference of opinion had arisen between him and the district judge, then, upon a certificate of such difference of opinion, that question might have been brought before the Supreme Court of the United States. The case seems to have been left to the decision of the district judge alone, and it does not appear that any question of difference of opinion, arising between the judges before Judge Swayne left the court, was certified in the case.

I have carefully examined the judiciary act of 1789, the

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2d section of the act of March 3, 1803, the act of May 31, 1844, the act of August 29, 1842, the act of March 3, 1863, and the act of February 5, 1867. None of these acts seem to have any application to such a case as that of Milliken, except the last-mentioned act of February 5, 1867. This is found in 14 Stats., 385. The 1st section of this act gives the several courts of the United States, and the judges of such courts, power to grant writs of *habeas corpus* "in all cases where any person may be restrained of his or her liberty, in violation of the Constitution or of any treaty or law of the United States;" and it gives to such person the right to apply to either of the judges for a writ of *habeas corpus*, by application in writing, verified by affidavit, setting forth the facts concerning the detention, and in whose custody the party is detained, and by virtue of what claim or authority, if known; and the judge to whom such application shall be made shall forthwith award a writ of *habeas corpus*, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the Constitution or laws of the United States. The writ is to be directed to the person in whose custody the party is detained, who is to make return upon the writ, and bring the party before the judge who granted it, and certify the true cause of the detention of such person within three days thereafter, etc. The petitioner may deny any of the material facts set forth in the return, or allege any fact to show that the detention is in contravention of the Constitution or laws of the United States, which allegations are to be under oath. This section further provides, that the court or judge shall, in a summary way, determine the facts of the case, by hearing the testimony and arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall be forthwith discharged and set at liberty.

It is further provided, that "from the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United

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States for the district in which said cause is heard, and from the judgment of said circuit court to the Supreme Court of the United States, on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default of such, as the judge hearing said cause may prescribe; and pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person, so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of *habeas corpus*, shall be deemed null and void."

The 2d section of this act contains provisions in regard to proceedings in State courts, which have no application to the present question. The latter clause, however, of the section is in these words: "This act shall not apply to the case of any person who is, or may be, held in the custody of the military authorities of the United States, charged with any military offence, or with having aided or abetted rebellion against the Government of the United States prior to the passage of this act."

If Milliken were in military custody, charged with a military offence, the provisions of the act would not apply. His discharge by *habeas corpus* would then be forbidden, and the right of appeal given by the act would not apply. From the facts which appear in the case, I am not prepared to say that Milliken was held in custody for any known military offence; for whether his confinement is put simply on the ground of a breach of his parol by committing the assault, or independently of a breach of parol for committing the assault alone, I am not satisfied that either way he could be held to have committed any military

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offence cognizable by the military authorities. So far as the parol alone is concerned, I take it to be clear, that that has no legal obligation after the cessation of the war, and so far as the assault upon the northern man is concerned, neither of them being in the military service of the United States, it was in no sense a military offence within the meaning of the statute.

If in this case the final decision of the court had been that Milliken should be remanded to military custody, I think, under the provisions of the 2d section, Milliken would have been entitled to an appeal to the Supreme Court of the United States. Whether upon a final decision, discharging him from custody, an appeal would be in favor of the party or parties who held him in custody, is not so clear, for the act provides that upon a judgment of discharge, the prisoner is to be at once set at liberty. This, of course, would end the case, and there would be nothing left upon which an appeal could be founded, or upon which a reversal of judgment could operate.

But aside from this, and upon the merits of the case, I do not see that any error was committed by the judge in discharging Milliken, or that it would be advisable, even if it were practicable, to bring the case before the Supreme Court of the United States, with any expectation of reversing that judgment.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

General U. S. GRANT,

Secretary of War ad interim.

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POWER OF CONGRESS TO REGULATE TELEGRAPHS.

1. The legislation of Congress, on the subject of inter-oceanic telegraph communication, declares it to be a subject-matter of national concern and commercial intercourse.
2. An inter-oceanic telegraph cable, which has its terminus upon the territory of the United States, comes within the regulating power of Congress.
3. It is doubtful whether Congress has power over the subject-matter of intercourse by telegraph strictly within the limits of a State, or extending through two or more States, having its termini within the territory of the United States.
4. It seems that Congress has not the power to regulate the charges upon a railroad; and, for the same reason, it cannot have that power over telegraphic communication within the limits of the United States.
5. As to foreign commerce, a State has no regulating power, as it is altogether and exclusively a matter of federal legislation; and the telegraph, when used as a vehicle of intercourse with foreign nations, has been claimed by Congress to be within the power to regulate commerce.
6. Congress may prescribe the rules upon which oceanic telegraphs, connecting the United States with foreign countries, shall be operated, and fix for them a tariff of charges.

ATTORNEY GENERAL'S OFFICE,
December 30, 1867.

SIR: I have received your letter of December 13, enclosing a resolution passed by the Senate on the 19th of July, 1867, in these words:

"*Resolved*, That the committee on commerce be instructed to inquire and report what measures, if any, can be adopted to prevent the practice of extortion upon citizens of the United States and the press by inter-oceanic telegraph companies."

You state that, by direction of the committee, this resolution is referred to the Attorney General for his opinion, "whether Congress has the power and authority to pass laws regulating the charges made by the telegraph companies mentioned in the resolution."

I deem it proper, first, to consider the legislation of Congress in relation to this subject. First in order is the act of March 3, 1857, (11 Stats., 187,) entitled "An act to

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expedite telegraphic communication for the uses of the Government in its foreign intercourse."

It authorizes the Secretary of State, under the direction of the President, to contract with any competent person or association for the aid of the United States in laying down a submarine cable between Newfoundland and Ireland, by furnishing two ships for that purpose, and also to contract for the use of such cable by the Government of the United States, for an annual sum not exceeding $70,000, as a consideration for such use, for a term of twenty-five years: "*Provided*, That the government of Great Britain shall, before or at the same time, enter into a like contract for those purposes with the same person, persons, or association, and upon terms of exact equality with those stipulated by the United States;" and that a tariff of prices, for the use of the cable by the public, shall be fixed by the Secretary of the Treasury of the United States and the government of Great Britain, and that the United States and its citizens "shall enjoy the use of the said submarine telegraph communication for all time, on the same terms and conditions which shall be stipulated in favor of the government of Great Britain and the subjects thereof, recognizing equality of rights among the citizens of the United States in the use of said submarine communication and the lines of telegraph which may at any time connect with the same at its terminus on the coast of Newfoundland and in the United States, in any contract so to be entered into by such person, persons, or association, with that government;" and, as a further proviso, that the contract to be made by the British government shall not be different from that already proposed by that government to the New York, Newfoundland, and London Telegraph Company, except such provisions as may be necessary to secure to each government the transmission of its own messages by its own agents, and that it shall be in the power of Congress, after ten years, to terminate said contract, upon giving one year's notice to the parties to such contract.

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The next act in order is that of July 1, 1864, (13 Stats., 340,) and is entitled, "An act to encourage and facilitate telegraphic communication between the eastern and western continents." In the preamble of this act it is recited, that Russia and Great Britain had granted to Collins, a citizen of the United States, "the right to construct and maintain a line of electric telegraph through their respective territories, from the mouth of the Amoor river, in Asiatic Russia, by way of Behring's Strait and along the Pacific coast, to the northern boundary of the United States, with a view of thereby uniting the telegraph systems of both continents, and of promoting international and commercial intercourse;" and that the United States desires to co-operate with Russia and Great Britain in the establishment and maintenance of such a line of communication.

The 1st section of this act grants to Collins and his associates the right to construct and maintain a line or lines of telegraph from any point or points on the line of the Pacific telegraph, northerly, through any of the territories of the United States, to the boundaries of British America, with such branch lines as may be needed to open communication with the various mining districts and other settlements in said territories. For these purposes, a permanent right of way is given over any unappropriated public lands of the United States, together with the right to take any timber and stone for construction purposes, and the use of unappropriated public lands for stations, not exceeding forty acres for every fifteen miles of line constructed across the public lands of the United States.

By the 2d section, the Secretary of the Navy is authorized to detail "one steam or sailing-vessel, in his discretion, to assist in surveys and soundings, laying down submerged cable, and in transporting materials connected therewith" in the construction of the line beyond the limits of the United States.

The 3d section provides that the Government of the United States shall at all times have priority in the use

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of the line or lines, so far as the same are within its territory, and shall have the right, when authorized by law, to connect said line or lines by telegraph with any military post of the United States, and to use the same for government purposes; and the Secretary of War is authorized to afford military protection for these lines within the territories of the United States. It is further enacted, that, subject to the right of prior use by the Government, as aforesaid, said line or lines shall be at times open to the public, and to any other telegraph company, upon the payment of the regular charges for transmission of dispatches, and all dispatches received shall be transmitted over said line and lines in the order of their reception at the telegraph office, and the answers to said dispatches shall be delivered to such parties as may be directed by the sender.

The 4th section provides, that the better to promote the public interest and welfare, by facilitating international and commercial intercourse between the eastern and western continents, in the construction of said telegraph, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same, for diplomatic, naval, military, postal, commercial, and other purposes, Congress may at any time add to, alter, amend, or repeal this act.

The 5th section provides, "That the rate of charges for public or private messages shall not exceed on said line the average usual rates in Europe and America for the same service or such rates as shall be ascertained and fixed by a convention between the United States, Russia, and Great Britain: *Provided*, That it shall not be lawful for the owners or officers of said telegraph line to make any contract, either directly or through any intervening party or parties, for the transmission of dispatches for any newspaper or newspaper association, upon terms different from those open to the enjoyment of all other newspapers or newspaper associations."

Next is the act of May 5, 1866, (14 Stats., 44.) This is entitled, "An act to encourage telegraphic communication

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between the United States and the Island of Cuba, and other West India Islands and the Bahamas." The preamble recites, that the International Ocean Telegraph Company, incorporated by the State of New York, is desirous of establishing a line of submarine telegraph communication between the United States and the West India Islands and the Bahamas.

By the 1st section there is granted to this corporation the sole privilege, for a period of fourteen years, to lay, construct, land, maintain, and operate telegraphic or magnetic lines or cables in and over the waters, reefs, islands, shores, and lands over which the United States have jurisdiction, from the shores of the State of Florida, in the said United States, to the Island of Cuba and the Bahamas, either or both, and other West India Islands.

The 2d section provides, that this company shall at all times give the United States the free use of said cable or cables, by a telegraphic operator of its own selection, to transmit any message to and from its military, naval, and diplomatic or consular agents, and the said company shall keep all its lines open to the public for the transmission, for daily publication, of market and commercial reports and intelligence, and all messages shall be forwarded in the order in which they shall be received; and that the company shall not charge more than the rate of $3 50 for messages of ten words, subject, however, to the power of Congress to alter and determine said rates.

The 3d section reserves to Congress the power to alter or repeal the act.

The act of March 20, 1867, is the last in the series. It is entitled, "An act to grant to the American Atlantic Cable Telegraph Company of New York the right of way and privilege to lay, land, and operate a submarine telegraph cable on the Atlantic coast of the United States, and establish telegraph communication between the United States and Europe, *via* the Bermudas and Azores Islands."

The 1st section grants to this telegraph company the power and privilege, having acquired the necessary land

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therefor, to lay, land, and operate their cable or cables on the Atlantic coast, except the coast of Florida, within the jurisdiction of the United States, for the period of twenty years.

The 2d section gives the company the right, having acquired the necessary land therefor, to lay, land, and operate their cable or cables within any of the harbors, waters, inlets, towns, and cities on the Atlantic coast, except the coast of Florida, offering the most practical and convenient landing, and to construct or erect all the necessary fixtures to accomplish the object of this act.

The 3d section provides, that the Government of the United States shall at all times have the preference in its use, upon terms that may be agreed upon between the Postmaster General and the said company. The 4th section provides, that Congress shall have power to alter, amend, or repeal this act.

It will be seen, from this review of the legislation upon the subject of inter-oceanic telegraphic communication, that Congress has declared it to be a subject-matter of national concern and commercial intercourse.

Under the liberal and comprehensive meaning which the Supreme Court of the United States has given to the power to regulate commerce, it is safe to say, that an inter-oceanic telegraph cable, which has its terminus upon the territory of the United States, comes within the regulating power of Congress.

The resolution of the Senate does not specify any inter-oceanic telegraph company by name. So far as I am advised, there are but two such companies having lines constructed and in actual use, and these are the great Atlantic cable, extending from the coast of Ireland to the coast of Newfoundland, which belongs to a British company, and the cable extending from the coast of Florida to Cuba. The Atlantic cable is owned and operated, I understand, by a British company. Connection with it is made by a line also belonging to a British company, extending from the end of the cable to Port Hood or Cape

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Breton island, and thence into the United States by the Western Union telegraph, which I understand is owned by a company incorporated by the laws of New York.

To this enterprise, so far as the laying of the cable is concerned, assistance was given under the before-recited act of March 3, 1857, which also authorized the Secretary of State to enter into contract with the proper company for the use of the cable by the Government of the United States for a fixed annual sum, and for the fixing of a tariff of prices to be paid by the public, and to secure to the United States and its citizens the use of the telegraph for all time to come, on the basis of entire equality as to terms and conditions which might be stipulated in favor of the government of Great Britain or its subjects, which equality of rights shall extend not only to the use of the submarine line, but to the use of the lines connecting the same with the United States.

I am not advised whether any contract has been made in conformity with this act.

If a contract has been made, the use of this line will of course be regulated by its provisions. But if no contract has been made, the question arises as to the independent power of Congress to fix a tariff of prices for the use of the submarine cable itself, and the line of the British company terminated at Port Hood. Beyond the jurisdiction of the United States, Congress can exercise no direct authority over either. But the connecting line of the Western Union Telegraph Company is within the territorial jurisdiction of the United States, and to that extent is within the scope of federal legislation, if in reference to its actual character it is a proper subject for such legislation.

It has been shown by the act of May 5, 1866, that Congress has exercised the power to fix a tariff of prices for the oceanic telegraph company, whose line extends from Florida to Cuba, and has reserved the power to alter, change, or fix these rates at any time. Proceeding upon the idea that telegraphic communication between the United States and foreign countries is commercial inter-

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course, and comes as such within the regulating power of Congress, there is no actual difference between such intercourse by a submarine cable which has its terminus in the United States, like the Cuban cable, and one having its termination out of the United States, like the Atlantic cable, which comes by means of a continuous line into the United States, and which is a vehicle of commercial intercourse between the United States and foreign countries. There is, however, this difference between the two, that the right of landing and operating the Cuban cable within the United States is conferred by federal authority, and is made subject to the right granted, and that the same act which gives the authority regulates the tariff of prices and reserves the power to change it.

There is no such grant of authority in regard to the Atlantic cable or the connecting line within the United States. The Western Union Telegraph Company, which maintains this line, derives its authority from the State of New York, so far as its line is within the territorial jurisdiction of that State, and outside of that State, from comity or consent of other States through which its line may be maintained.

If the question here were as to the power of Congress over the subject-matter of intercourse by telegraph strictly within the limits of a State, or, extending through two or more States, having its termini within the territory of the United States, I would feel hardly prepared to say, that the regulation of such an intercourse would be a proper subject-matter for federal legislation.

There are various subjects-matter of commercial intercourse in and among the States of the Union which the Supreme Court has always excepted from federal power or legislation. Such is the intercourse by ferries, bridges, and roads of every description.

All these are vehicles of commercial intercourse, but have hitherto been left to State legislation exclusively. Certainly the telegraph is not so clearly a vehicle of commerce as the railroad, and if, as I suppose, Congress has not the power to regulate the charges upon a railroad,

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it cannot have a like power over telegraph communication.

Mr. Justice McLean, in the Passenger Cases, (7 How., 133,) says: "An inquiry is made, whether Congress, under 'the power to regulate commerce among the several States,' can impose a tax for the use of canals, railroads, turnpike roads, and bridges constructed by a State or its citizens?

"I answer, that Congress has no such power. The United States cannot use any one of these works without paying the customary tolls. The tolls are imposed not as a tax, in the ordinary sense of that term, but as compensation for the increased facility afforded by the improvement."

In the same case, referring to commerce among the States, and the difficulty of deciding whether particular subjects-matter appertaining to such commerce fall within the commercial power of the Union or the municipal power of the State, it is said, that no precise line or rule can be laid down, and that each case must be decided upon its own circumstances as it arises; but that, as to foreign commerce, a State has no regulating power, as it is altogether and exclusively a matter of federal legislation.

The operations of the telegraph bear a close resemblance to those of the mail, but the telegraph can scarcely come within the federal power over post offices and post roads. It has been treated by Congress hitherto as an agent of commercial intercourse, and as such, when used as a vehicle of intercourse with foreign nations, coming within the power to regulate commerce.

I have said that this view is sustained by the decisions of the Supreme Court of the United States. In Gibbons *vs.* Ogden, (9 Wheat., 189,) Mr. Chief Justice Marshall, delivering the opinion of the court, defines commerce as follows: "Commerce, undoubtedly, is traffic; but it is something more, it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In the same case, in reference to the commercial power

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properly exercisable by the States, he said that "Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Congress; and, consequently, they remained subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given."

It is said again, in the same case, "But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States.

"It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States.

"Every district has a right to participate in it. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State."

Mr. Justice Johnson, in the same case, uses this language:

"Commerce, in its simplest signification, means an exchange of goods; but, in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects would not possess power to regulate commerce."

The operations of the telegraph are so useful and necessary, that it comes clearly under the designation of a public

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use, in aid of which the eminent domain power may be exercised in the appropriation of private property.

The oceanic telegraphs, connecting the United States with foreign countries, are most important agents as vehicles of commercial intercourse; and I am inclined to the opinion, though I speak with great diffidence, that, when devoted to such uses, these telegraphs become subject to the regulating power of Congress, and that, in the exercise of this power, Congress may prescribe the rules upon which they shall be operated and fix for them a tariff of charges.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. Z. CHANDLER,

Chairman Committee on Commerce, U. S. Senate.

CASE OF CAPTAIN MEADE.

The President has power to review the action and finding of a board of naval surgeons constituted under the 4th section of the act of April 21, 1864.

ATTORNEY GENERAL'S OFFICE,

December 30, 1867.

SIR: I have examined the papers in the case of Captain R. W. Meade, of the navy, and have the honor to state my opinion.

It appears that, on the 10th of December, 1867, a board, consisting of two surgeons of the navy, appointed by the Secretary of the Navy, made examination of Captain Meade as to his fitness to act under the 4th section of the act of April 21, 1864. (13 Stats., 53.) This board reports that they find Captain Meade affected with imperfect use of the left leg, the result of an attack of paralysis sustained last winter, and from the effects of which he has not yet entirely recovered. The conclusion of their report is in these words: "We therefore do not consider him at this time physically qualified to perform all his duties at sea."

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On the next day, December 11, the Secretary of the Navy addressed a letter to Captain Meade, in which he states that the board of surgeons, before which he recently appeared, not having recommended him for promotion, he will from this date be placed upon the retired list, in conformity with the 4th section of the act of April 21, 1864, entitled "An act to amend an act entitled, 'An act to establish and equalize the grade of line officers,'" etc.

On the 16th of December, Captain Meade appealed to the President to rescind the order for his retirement.

By the 4th section of the act of July 16, 1862, (12 Stats., 584,) it is provided, "That the Secretary of the Navy shall appoint an advisory board of not less than three officers, senior to those to be reported upon, who shall carefully scrutinize the active list of line officers above, and including the grade of masters in the line of promotion, and report to him in writing those who, in the opinion of the board, are worthy of further promotion, in the following words: We hereby certify that ———— has the moral, mental, physical, and professional qualifications to perform efficiently all his duties, both at sea and on shore, of the grade to which he is to be promoted, and recommend him for promotion."

The 5th section of the same act provides, that the officers recommended shall be immediately commissioned, according to their present seniority, in the following grades and numbers, etc.

The act of April 21, 1864, hereinbefore referred to, provides in the 1st section, "That no line officer of the navy upon the active list, below the grade of commodore, nor any other naval officer, shall be promoted to a higher grade, until his mental, moral, and professional fitness to perform all his duties at sea shall be established to the satisfaction of a board of examining officers, to be appointed by the President of the United States.

This board is to consist of not less than three officers, senior in rank to the officers to be examined.

It gives to the officer the right to be present, to make a

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statement of his case on oath, and have witnesses; and the finding of the board is to be presented to the President for his approval or disapproval. It further provides, that no officer shall be rejected until after such public examination of himself, and the records of the department in his case, unless he fails to appear before said board after having been duly notified.

Then follows the 4th section, in these words: "That no officer in the naval service shall be promoted to a higher grade therein, upon the active list, until he has been examined by a board of naval surgeons, and pronounced physically qualified to perform all his duties at sea. And all officers whose cases shall have been acted upon by the aforesaid boards, and who shall not have been recommended for promotion by both of them, shall be placed upon the retired list."

I find no provision anywhere in this act constituting this board of naval surgeons, as to who shall appoint them, or as to the number of which the board shall consist, nor any express provision for approval or disapproval by the President.

It appears that the Secretary of the Navy has, under this section, appointed a board of two naval surgeons; and upon their report, as hereinbefore stated, he has placed Captain Meade upon the retired list. It further appears, that Captain Meade has not as yet been examined by the board of officers to be appointed by the President, nor has he been in any default in not appearing before that board.

I am of opinion that the President has a supervisory power over the action of the naval board, under section 4, and may approve or disapprove the same. I think it clear enough, under the 5th section of this act, that the finding of this board, as well as that of the board of officers, must come under the supervision of the President. This 5th section provides, that all officers not recommended for promotion under the 4th section of the act of July 16, 1862, "shall have the right to present themselves for examination, according to the provisions of this act; and if

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found duly qualified, and such finding be approved by the President of the United States, they shall be promoted to the same grade and place as if they had been recommended by the board."

Now, the examination to be had under the provisions of this act are an examination before the board of officers and an examination before the board of naval surgeons. Both examinations must precede a promotion, and the finding as to both must be approved by the President. Although the 5th section provides only for such officers who have been before the board established by the act of 1862, and were not recommended by that board, and although Captain Meade may not be of that class, yet that class of officers must be examined by two boards provided for by the act of 1864, and, in the same manner as Captain Meade, must be examined.

When we perceive that Congress provides, as to that class, that the finding in their case shall be subject to the approval of the President, it affords us safe ground to say that the same approval exists as to all other officers examined by both boards.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

The PRESIDENT.

THE DISMAL SWAMP CANAL.

The joint resolution of July 25, 1866, authorizing the sale of the stock of the Dismal Swamp Canal Company, owned by the United States, considered.

ATTORNEY GENERAL'S OFFICE,

January 25, 1868.

SIR: By a joint resolution, approved July 25, 1866, to which is a preamble reciting that the United States are interested in the Dismal Swamp canal, by holding eight

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hundred shares of the stock of the Dismal Swamp Canal Company, and that the canal should be kept open as a navigable highway, without further outlay on the part of the United States, the Secretary of the Treasury is authorized to sell said stock at auction, or otherwise, "in such manner as will best protect the interest of the United States in said canal, and will insure that the same will be kept open as such navigable highway, without further expense to the Government: *Provided*, That the instruments and papers effecting such sale, in the manner aforesaid, shall be approved by the Attorney General before the delivery thereof."

The Secretary of the Treasury, under the authority thus conferred upon him, proposes to sell the stock of said company, owned by the United States, on the 8th of February next; and inquiry having been made as to what guaranty will be required by the Government at the approaching sale to insure the canal to be kept open as a navigable highway, this inquiry is submitted by the Secretary to the Attorney General, who is requested to communicate his views to the Secretary to enable him to respond.

It appears that the Dismal Swamp Canal Company was chartered by the General Assembly of Virginia, by an act passed December 1, 1787, to commence and be in force after the passage of a like act by the General Assembly of North Carolina. The capital stock authorized by this act was $80,000, which was directed to be divided into three hundred and twenty shares, of $250 each; but the company, under subsequent legislation, from time to time, increased the stock beyond the original limit, when, finally, by an act of the Virginia legislature, passed February 17, 1837, it was authorized to still further increase it to one thousand nine hundred and forty-four shares, at which it now remains.

From a report to the Secretary of the Treasury, dated April 23, 1866, it seems that of this stock there was then owned—

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By the United States, 800 shares, representing. . $200,000
By the State of Virginia, 760 shares, representing 190,000
By individuals, 384 shares, representing . . . 96,000

Recently, however, the State of Virginia has disposed of the stock owned by it to private parties, so that at this time the number of shares held by individuals greatly preponderates over that owned by the Government of the United States or of a State.

The stock owned by the United States was subscribed and paid for under the authority of the act of May 18, 1826, (4 Stats., 169,) and of the act of March 2, 1829, (*Ib.*, 350.)

But, independently of the amounts thus subscribed and paid, the United States subsequently contributed largely toward improving the navigation of the canal. By act of July 4, 1836, (5 Stats., 130,) Congress appropriated $15,000 for improving the natural channels at the northern and southern entrances of the canal; and by act of July 7, 1838, (*Ib.*, 270,) a further appropriation of $10,000 was made for the same purpose. So by act of February 26, 1845, (6 Stats., 936,) the company was authorized to retain the dividends thereafter to be declared, and then on hand, on the eight hundred shares of stock held by the United States, to be applied to refund the principal and interest on $32,712 32, moneys advanced by the company to complete certain work, &c.

The act incorporating this company contains the usual provisions with regard to the election of a president and directors, the appointment of officers, and making regulations for their government, the filling of vacancies, etc.; and by the 9th section thereof it is declared, that the canal, locks, causeways, and other works, with all their profits, shall be, and the same are hereby, vested in the proprietors (*i. e.* the *stockholders*,) their heirs and assigns, forever, as tenants in common, in proportion to their respective shares; and that the same shall be deemed real estate, and be for-

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ever exempt from the payment of any tax, imposition, or assessment whatsoever. However, by an act passed Febuary 20, 1820, it is provided, that the shares of stock, shall thenceforth be deemed, both in law and in equity, personal estate, and be transferable in such manner and form as the president and directors of the company shall prescribe.

The 11th section of the act of incorporation enacts, "That the said canal and works to be erected thereon in virtue of this act, and the causeways, when completed, *shall forever hereafter be esteemed and taken as public highways*, free for the transportation of all goods, wares, commodities, or produce whatsoever, and for travelling, on payment of the tolls imposed by this act," &c. Here the use of the canal and causeways as common highways, on payment of the tolls prescribed, is secured, and they can never be closed to the public. The property must ever remain subject to that use, by whomsoever held.

In the preamble to the resolution it is stated, that the United States are interested in said canal, *by holding* 800 *shares of the stock of said company*. The interest here described is that of a stockholder, a moneyed interest merely. But in the enacting part of the resolution, the interest referred to is plainly that which the United States are presumed to have in the canal, in view of its national importance as a navigable highway—a public interest. The stock is to be sold in such manner as will best protect the *latter* interest, and insure the canal to be kept open as a *navigable* highway, without further expense to the Government.

That the canal shall be kept forever *open as a highway* requires no guaranty; this is already secured by the act which incorporated the company. But that it shall be always kept *navigable*, depends upon the action of the corporation having the managment thereof, and the resources at its command. As a stockholder simply, the Government is not in a situation to control the action of the corporation with reference to this object. It has a voice in the affairs of the company only in proportion to the number of shares owned by it, which, as has been shown, is

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greatly below that held by individual stockholders; and it can place the purchaser of its shares in no better situation.

The *perpetual navigability* of the canal, in my judgment, cannot well be insured by any sort of individual guaranty that a purchaser can reasonably be asked to give; this must be left to depend upon the commercial importance of the work and the revenue to be derived therefrom. So long as its business will defray the expenses of the management, and of keeping it in repair, so long will it be kept navigable. Should the business fail to yield a sufficiency for these purposes, the work must inevitably go down, unless sustained by inexhaustible resources. In a report of Colonel E. S. Parker to the Secretary of the Treasury, dated October 24, 1867, the aggregate amount required for the immediate improvement of the canal is $355,000.

Suppose this amount expended to put it in navigable condition; that condition must of necessity be kept up by still further expenditures from time to time, and, unless it yields an adequate revenue for this object, there must soon be an end.

The canal cannot be closed to the public; it must ever remain *open;* and that it shall also be kept *navigable* will, I think, be sufficiently guarantied by the strong interest which all the stockholders must naturally have in maintaining it in that condition. When this interest fails, it will be because the earnings of the canal are not adequate to keep it up, and *then* no individual guaranty will suffice.

The resolution commits the manner of the transfer of the stock held by the Government to the discretion of the Secretary, providing the instruments for effectuating the same are approved by the Attorney General. In transferring the shares to a purchaser, it will be sufficient to observe the form prescribed for that purpose by the corporation.

The duty devolved upon the Attorney General, by the act of July 25, 1866, is to approve or disapprove of the instruments and papers effecting a sale, which will insure

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the keeping open of the canal or highway without further expense to the Government. No such instruments are submitted to me with your letter, nor do you request me to prepare any. Indeed, if you had made such a request, I should be at a loss to advise how this direction of the act could be practically carried out. If, for instance, you should make it a condition of the sale, that the purchaser of the stock should be required to give a bond to the United States, conditioned that the canal should be kept open as a navigable highway without further expense to the Government, in an amount, and with sufficient sureties, to make it an available security, it is manifest that such terms would either defeat the sale altogether or greatly depreciate the price at which the stock could otherwise be sold. Perhaps the safest course would be, under these circumstances, to make a special report, calling the attention of Congress again to this subject, and to the difficulties that lie in the way of carrying out the act of July 25, 1866; and in the meantime to suspend the sale of the stock.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

CHORPENNING'S CASE.

1. The cases defined in which the head of a department is authorized to reopen the final decision of a predecessor.
2. Where the Postmaster General is authorized and required by act of Congress to adjust a particular claim, nothing but a new authority, emanating from Congress, will enable one of his successors to open his adjustment, upon the ground that he adopted an erroneous basis of settlement.
3. The fact that, since the settlement, the committees of the two Houses recommended by reports a different basis of settlement will not authorize a reopening of the case.
4. It seems that the President would have no power, in such a case, to order the reopening of the claim.

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ATTORNEY GENERAL'S OFFICE,
January 27, 1868.

SIR: I have the honor to submit my opinion in the Chorpenning case upon the question, whether "the case can still be deemed open for the consideration of the Postmaster General?"

By an act passed March 3, 1857, entitled, "An act for the relief of George Chorpenning, Jr." (11 Stats., 521,) the Postmaster General was required to adjust and settle the claim of said Chorpenning for carrying the mails, and to make an allowance for a *pro rata* increase of compensation. Under this act, Postmaster General Brown, who was then in office, did adjust and settle this claim, as appears by his report to Congress under date of December 1, 1857. In his report to Congress, Postmaster General Brown says:

"In making the *pro rata* allowances, the act of Congress not being specific on this point, I have taken as the basis of the calculations the original pay under each contract, instead of the higher sum of $30,000, to which, as above observed, the compensation has been raised. But even upon this lower basis, the sum allowed, it will be perceived, is very considerable, independently of the further increased compensation of $16,000 under the old, and $17,500 per annum under the new contract.

"The settlement of this claim has not been made without considerable embarrassment. The act of Congress was peremptory to adjust and settle, not according to the proofs that might be taken before the final action, but as shown by the proofs and affidavits on file in the House of Representatives." These were to be the sole guides in the settlement, and neither the records of the department nor any contradictory or explanatory testimony could be taken by the Government to assist in attaining what might be considered exact justice in the case. The act directed that the claimant should be paid *pro rata* for carrying his own mail, under his contract, from Sacramento, around by San Francisco and the coast, to San Pedro, instead of east by

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Carson's Valley to Salt Lake, and that he should be paid also for carrying the Independence mail that way, when the records and correspondence of the department show that the change in the route was permitted at the claimant's own instance and request, and not forced upon him by an order or wish even of the department. The *pro rata* allowance for this change alone, it will be observed, is $21,794 62. The act further directed, that he should be paid *pro rata* for carrying the eastern mail for Salt Lake, sent around by the Isthmus to California, whereas by the contract itself, and the usage of the department in all such cases, he was bound, as a contractor, to carry the mails of the United States, from whatever quarter they might be sent to his line. The principal difficulty in the case, however, was in deciding on the true intent and meaning of the act in requiring him to be paid *pro rata*. *Pro rata*, or in proportion to what? The first contract was to carry the mail at $14,000, and the second at $12,500 per annum. Congress, however, in the very act which granted him this *pro rata* relief, raised these prices up to $30,000 per annum.

Now, in making the estimate required by Congress, should the basis of calculation be a *pro rata* on the $14,000 and the $12,500 contracts, or on the $30,000? The department could find nothing in the act throwing light on this subject, and therefore made the calculation on the contract or lowest basis, instead of the $30,000 basis.

In doing so the department has gone on the principle, that in every case of doubt in a matter of this kind the Government was entitled to the benefit of that doubt, until Congress by some new enactment should remove it."

I understand that the ground upon which you are now asked to open this case is, that Postmaster General Brown, in adopting a basis for *pro rata* compensation, took the contract prices, and not the $30,000 per annum mentioned in the act; in other words, that he committed an error in this respect in the construction of the statute, and therefore settled and adjusted the account upon an improper

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basis. No mere error of calculation is alleged in reference to the basis which he did adopt, nor is any new fact presented which was not before him at the time he made his decision. The ground taken in favor of reopening his decision was, that he erred in a matter of law.

I take it to be a well-settled principle, that the final decision of a case before a head of department is binding upon his successors in the same department, subject, however, to some equally well-established exceptions, and these are, where there has been a palpable error of calculation, or where new facts are subsequently brought forward, which show that the former decision was erroneous, and would probably not have been made if they had been known at the time of the decision. It is also well established, that such a decision may be opened by a resolution or act of Congress directing it to be done.

Although there is not such an entire uniformity as is desirable in the opinions of my predecessors as to the extent of this rule and its exceptions, yet the clear weight of their authority is in favor of the rule as stated. To this, in the way of authority, I need only add what is said by the Supreme Court of the United States in the case of The United States *vs.* The Bank of the Metropolis, (15 Peters, 400,) which involved the question as to the power of the Postmaster General to review the decision of his predecessor. Mr. Justice Wayne, delivering the opinion of the court, says: "The successor of Mr. Barry had the same power and no more than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the department.

This right, in an incumbent, of reviewing a predecessor's decisions, extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, as these were, by the head of a Depart-

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ment, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor."

Now, it will be observed that the decision of Postmaster General Brown in this case does not stand merely upon his general authority, as the head of the Post Office Department, to settle all cases and all questions that may arise in the department, but that, in deciding upon this claim of Chorpenning, he acted under a special power and duty conferred by an act of Congress to adjust and settle this very claim. This special authority, given in the very case, seems to me carried with it the final and exclusive jurisdiction over the subject. In the exercise of the authority so conferred, he has adjusted and settled this claim; and nothing short of new authority, emanating from Congress, will enable one of his successors to open that adjustment and settlement, upon the ground that he has committed an error of judgment in adopting the basis of settlement.

The facts which have transpired in regard to this claim, since its settlement by Postmaster General Brown, in my judgment, furnish no ground for reopening that settlement. It is said, that, upon a subsequent application to Congress by Chorpenning, the committees on post offices and post roads in both Houses adopted reports recommending a settlement upon a different basis from that adopted by the Postmaster General.

I have looked in vain for these two reports. But, if such reports were made, there is no pretence that they were adopted by Congress, or that any act or resolution has been since passed in reference to this claim.

Applications have since been made to two of the successors of Postmaster General Brown: in 1859 to Postmaster General Holt, and in 1861 to Postmaster General Blair,

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both of whom refused to reopen the settlement. Although President Buchanan expressed the opinion, in 1861, that the case ought to be opened for reconsideration, and although a similar opinion has been since expressed by President Johnson, neither President Buchanan nor President Johnson required that the case should be opened; and we are not, therefore, put to consider the question, how far such an express order would compel the reopening of the case.

It would seem, however, from opinions of two of my predecessors, Mr. Wirt and Mr. Taney, that even if the President had given an express order to the Postmaster General to reopen this claim, it would have been subject to grave objections. Mr. Wirt says: "After looking at the nature of the office of the President of the United States, the character of the duties devolved upon him, and the utter impossibility of his sitting in appeal over the accounting officers of the Government, or superintending and directing their operations, I gave it as my opinion, that he has nothing to do with the settlement of public accounts, either in the form of direction to the accounting officers *a priori*, or revision and reversal *a posteriori*; that his interference with this business, so far from being required by law, would be a usurpation on the part of the President which the accounting officers would not be bound to respect, except it were (as in the case of Governor Tompkins) expressly ordered by the particular law to act under the direction and orders of the President."

Mr. Taney says, speaking of a decision of the accounting officers of the Government: "These laws, as well, indeed, as those which preceded them on the same subject, appear to me not to contemplate any appeal to the President; and I think, therefore, that the decision of the Comptroller in this case is conclusive upon the executive branch of the Government, and that the President does not possess the power to enter into the examination of the correctness of the account, for the purpose of taking any measures to repair the errors which the accounting officers

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appointed by law may have committed. The party who supposes that justice has not been done to him must seek relief in court when a suit is brought against him, or may bring his claims to the consideration of Congress; and these, in my opinion, are the only means of redress left to General Taylor, if the accounting officers have erred in their decision."

I have hereinbefore called attention to the fact, that the adjustment and settlement of this claim was made by Postmaster General Brown under a special act of Congress.

If, after the lapse of ten years from the time when that settlement was made, you should reopen the case and arrive at a different conclusion, your adjustment would be no more binding than that of your predecessor, and might hereafter be opened by one of your successors, and in that way the claim might be kept in suspense, and never reach a final adjustment. Certainly, a rule which would lead to such consequences can hardly be considered a sound one. If the right to open the decision exists in favor of the claimant, it exists equally in favor of the Government.

If it had happened that Postmaster General Brown had made a settlement according to the ratio claimed by Chorpenning, in conformity with the doctrine now set up, you would, on this hypothesis, have a right to reopen the case and reverse the decision, if you were satisfied that the ratio adopted was incorrect. Upon full consideration, I am of opinion that the case must be considered as definitively settled as far as your action is concerned.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. A. W. RANDALL,
Postmaster General.

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CASE OF BROTT & DAVIS.

1. A barge used for transportation of merchandize, and owned by a person not in the military service, is within the species of property enumerated in the 5th section of the act of March 3, 1849, as property to be paid for when lost in the military service of the United States.
2. The act of July 4, 1864, "to restrict the jurisdiction of the Court of Claims," does not repeal the act of March 3, 1849.
3. The act of February 19, 1867, "to declare the sense" of the act of July 4, 1864, was intended to take away all authority to settle claims for the destruction or appropriation of personal property by the military authorities, if they originated during the rebellion and in an insurrectionary State.
4. The Third Auditor and Second Comptroller have no power, since the passage of the act of February 19, 1867, to settle a claim for the value of a barge owned by residents of New Orleans, which was lost in 1864, in the Mississippi river, while under impressment by the military authorities.

ATTORNEY GENERAL'S OFFICE,
February 4, 1868.

SIR: I have had under consideration the claim of Messrs. Brott & Davis, referred to this office, on the 25th of November last, by the Secretary of War *ad interim*, for my opinion, on the following state of facts:

On the 21st of June, 1864, the barge "Brott & Davis," owned by the claimants, was seized at New Orleans, Louisiana, pursuant to orders of the chief quartermaster of the department of the Gulf, to be used in the transportation of horses, mules, and wagons belonging to the army.

After being fitted out for that purpose at a Government ship-yard, it was loaded with horses, and, in the following month of July, sent up the Mississippi river in tow of the steamer "Colonel Cowles." During the voyage, and when within a few miles of Donaldsonville, Louisiana, the barge sprung a leak, was taken to the shore, unloaded, and there left in a sinking condition. The steamer proceeded up the river with other craft in tow to Morganza, and the next day, on her return, the barge was found sunk in ten feet of water, and was abandoned as a total loss.

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It appears to be conceded that the loss was without any fault or negligence on the part of the claimants, the barge, while in the military service, having been under the exclusive management of persons in Government employ. It further appears that, previous to the month of May, 1862, one of the claimants resided in the State of Minnesota, and the other in the State of New York, and that they went to New Orleans after the capture and occupation of that city by the United States forces, where they both resided and were engaged in business together at the time of the seizure and loss of their barge.

Their loyalty is admitted.

Upon this state of facts, the following question is propounded in the letter above referred to: "Can this claim properly be settled by the Third Auditor and Second Comptroller under the provisions of the acts of March 3, 1849, March 3, 1863, and July 28, 1866; or do the acts of July 4, 1864, and February 19, 1867, apply in such a sense as to prohibit such settlement?"

The 2d section of the act of March 3, 1849, entitled "An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States," (9 Stats., 415,) provides, among other things, that any person who has sustained or shall sustain damage by the abandonment or destruction, by unavoidable accident, of any horse, mule, ox, wagon, cart, boat, sleigh, or harness, while such property was in the military service of the United States, either by impressment or contract, "shall be allowed and paid the value thereof at the time he entered the service."

The 3d section of the act provides that such claims shall be adjusted by the Third Auditor, under rules to be prescribed by the Secretary of War. The 4th section provides that when the Auditor adjudicates in favor of the claim, the claimant, upon the production of a copy of the adjudication, certified by said Auditor, shall be entitled to payment at the Treasury of the United States.

A doubt, perhaps, might be raised upon the act of 1849,

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whether it extended to the property of an owner who was not himself in the military service, and whether a "boat," used in connection with the other items of property therein mentioned, would include a vessel of such magnitude as a barge used for transportation of merchandize. The 5th section of the act of March 3, 1863, entitled "An act to promote the efficiency of the corps of engineers and of the ordinance department, and for other purposes," (12 Stats., 743,) provides that the 2d section of the act of March 3, 1849, "shall be construed to include the steamboats and other vessels, and 'railroad engines and cars,' in the property to be allowed and paid for when destroyed or lost under the circumstances provided in said act."

If the barge in this case did not come within the description "boat," used in the 2d section, it clearly is a "vessel" within the meaning of this last act. So, too, I think the species of property enumerated in this 5th section, as property to be paid for, cannot be considered as only to be paid for in favor of an owner actually in the service. Steamboats and railroad engines, unlike horses, are not generally in the possession of the owner; and the same is true of such a craft as a barge used for transportation.

I am therefore of opinion, that the claim in this case comes fairly within the provisions of the two acts which have been enumerated.

Next in order is the act of July 4, 1864, entitled "An act to restrict the jurisdiction of the Court of Claims," etc. (13 Stats., 381.) The 1st section of this act provides, "That the jurisdiction of the Court of Claims shall not extend to, nor include any claim against, the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof."

The 2d and 3d sections of the act provide for the claims of loyal citizens in States not in rebellion, for certain descriptions of property, to wit, quartermasters' stores and subsistence. As to the first class, the claim is to be ex-

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amined by the Quartermaster General, and as to the second, by the Commissary General of Subsistence, and both are to be reported to the Third Auditor for settlement.

It is very clear that the claim of Brott & Davis is by this act excluded from the jurisdiction of the Court of Claims. They could not prosecute their claim in that court. But does this act impliedly repeal the acts of 1849 and 1863, and take away the right there given to prosecute this claim before the Third Auditor? Standing upon the act of July 4, 1864 alone, there would be some reason for saying that such implied repeal was intended. But we are relieved from all doubt on this point by the 8th section of the act of July 28, 1866, entitled "An act to supply deficiencies," etc. (14 Stats., 327.) Section 8 is in these words: "That section 4 of the act entitled 'An act to provide for the payment of horses and other property lost or destroyed in the service of the United States,' approved March 3, 1849, be amended, by striking out all after the enacting clause, and in lieu thereof inserting the words: 'That the said Auditor shall in all cases transmit his adjustment, with all the papers relating thereto, to the Second Comptroller for his revision and decision thereon, the same in all respects as is provided in the act of the 2d of September, 1789.'"

There can be no doubt, upon this section, that Congress considered that the act of March 3, 1849, was still in full force, and that the act of July 4, 1864, which took from the Court of Claims its jurisdiction in the cases therein referred to, did not take from the Third Auditor his jurisdiction over the claims embraced in the act of 1849, and the amendatory act of 1863.

Notwithstanding this construction is inevitable, yet it is not easy to see upon what ground the remedy is taken from the Court of Claims, and left untouched before the Third Auditor. It is clear that, before the act of 1864, the Court of Claims had full jurisdiction over the same claims as those embraced in the act of 1849. It is clear

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that, but for the restrictive act of 1864, these claimants might have prosecuted their claim either before the court or the Third Auditor.

The remedy was concurrent. The policy of the act of 1864 is manifest. It is, that as to property appropriated for military use from the beginning to the end of the rebellion, (precisely as the property of these claimants was appropriated,) the remedy for the loss of such property shall be taken from the Court of Claims.

That court has still jurisdiction over all such appropriations made *before* or *since* the rebellion. It is a denial of a remedy for appropriations of property *during the rebellion;* and it is difficult to imagine a reason why the same policy was not extended to a denial of a remedy before the Third Auditor.

We next come to the act of February 19, 1867, entitled "An act to declare the sense of an act entitled 'An act to restrict the jurisdiction of the Court of Claims, and to provide for the payment of certain demands for quartermaster's stores and subsistence supplies furnished to the army of the United States.'" (14 Stats., 397.)

It provides, that the act of 1864, restricting the jurisdiction of the Court of Claims, "shall not be construed to authorize the settlement of any claim for supplies or stores taken or furnished for the use of, or used by, the armies of the United States, nor for the occupation of, or injury to, real estate, nor for the consumption, appropriation, or destruction of, or damage to, personal property, by the military authorities or troops of the United States, where such claims originated during the war for the suppression of the southern rebellion, in a State or part of a State declared in insurrection by the proclamation of the President of the United States, dated July 1, 1862, or in a State which, by an ordinance of secession, attempted to withdraw from the United States Government."

This act, as its title imports, is a declaratory law, intended to declare the sense and the construction to be put on

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the former act. As has been seen, it was necessary to put a construction on that former act, in determining the question, whether it did affect the prior legislation in reference to the jurisdiction of the Third Auditor; and the conclusion arrived at was, that it must be altogether confined to suits in the Court of Claims. But this declaratory act gives a new sense and a new construction to that act. It first refers to the claims for supplies or stores which are provided for in the former act of 1864, and which are to be settled by the Third Auditor. It next refers, among other things, to precisely such claims as that of Brott & Davis: that is to say, claims for the appropriation or destruction of personal property by the military authorities, and takes away all authority to settle these claims, if they originated during the rebellion, and in a State in insurrection, or that had passed an ordinance of secession. This property of Brott & Davis falls precisely within the forbidden class.

Certainly it required no declaratory law to shut out this claim *from the Court of Claims*. That much was effectually done by the act of 1864. But the act of 1864 might be so construed as to leave open the remedy before the Third Auditor; and therefore this declaratory act is passed, to cut off such possible construction.

The very thing Congress had in view in this declaratory act was, as to a certain class of cases, to cut off *all* remedy; and as the only remedy left, after the act of 1864, was before the Third Auditor, it was *that* which was aimed at. The language used is very appropriate. It does not speak of a remedy by *suit*, which would be appropriate in reference to the remedy in the court, but it used the word "settlement," which is the very word used as to claims before the Third Auditor.

I am therefore of opinion, that this claim of Brott & Davis cannot be settled by the Third Auditor and Second Comptroller, under the provisions of the acts of March 3, 1849, March 3, 1863, and July 28, 1866, and that such

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settlement is prohibited by the acts of July 4, 1864, and February 19, 1867.

I am, sir, very respectfully,
Your obedient servant,
HENRY STANBERY.

General GRANT,
Secretary of War ad interim.

EMPLOYMENT OF COUNSEL BY A DEPARTMENT.

The Secretary of War has power to employ and pay special counsel to represent a military officer against whom a writ of *habeas corpus* has been issued by a circuit court in the case of a prisoner held in custody by him.

ATTORNEY GENERAL'S OFFICE,
February 7, 1868.

SIR: I have the honor to acknowledge the receipt of your letter of this date, asking my opinion as to your authority to employ counsel on the following state of facts:

A writ of *habeas corpus* has been sued out from the circuit court of the United States at Richmond, Virginia, to bring before the court the body of one Combs, alleged to be confined in the Libby prison, by an officer of the United States army, without legal authority. To this Major Vance, the keeper of Libby prison, makes return, that he holds said Combs by order of General Schofield, on a charge of murder, and that he has been arrested because the civil courts of Carroll county utterly fail to prosecute said Combs.

Mr. Chandler, the United States district attorney at Richmond, is unable to attend to the case in consequence of sickness, and you ask my opinion whether you are authorized to employ special counsel to defend Major Vance.

If, as I suppose is the fact, Major Vance is an officer of the United States army, and has acted under the orders of his immediate superior, General Schofield, I am of opin-

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ion that as the head of the War Department, if you deem the case a proper one to be defended, you have authority to employ special counsel, and to agree upon the fee which shall be paid.

Your authority for such employment of counsel is under the act of February 26, 1853, (10 Stats., 161,) which provides, "for the services of counsel, rendered at the request of the head of a department, such sum as may be stipulated or agreed on."

The opinion I have expressed is in conformity with the construction that has been heretofore put upon this act by my predecessors. Attorney General Black (9 Opinions, 148) says: "When a ministerial or executive officer is sued for an act done in the lawful discharge of his duty, the Government which employed him is bound, in conscience and honor, to stand between him and the consequences.

"It is for the head of the department to which he belongs to decide whether or not he shall be defended at the public expense. . After that decision is made in the affirmative, the same functionary may request the district attorney or other counsel to appear and conduct the cause.

"The district attorney has no right, by virtue of his commission, to commit the Government, by adopting the act complained of; nor has he any authority to interfere with the case, except what he derives from the head of the proper department."

Attorney General Bates, in an opinion given on the 13th of May, 1861, after referring to the above clause in the act of 1853, proceeds as follows: "The purpose of this law is obvious. Legal controversies often arise in which the Government is concerned; and although the counsel authorized and required by law to represent the Government in these controversies is the United States attorney for the proper district, it often happens that it is expedient to employ other counsel in his aid or in his place.

"And sometimes the district attorney may be called to perform professional services for the Government which

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are not embraced in his enumerated duties, and for which the fee-bill provides no compensation.

"In such cases, the law allows the head of the department to which the business belongs to employ and pay counsel 'such sum as may be stipulated or agreed on.'"

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

General U. S. GRANT,
Secretary of War ad interim.

CLAIMS OF STOVER AND CHEEVER.

The Secretary of the Navy cannot properly pay the moneys due upon the contracts of the United States with the Stover Machine Works to either of the claimants thereof, Stover or Cheever.

ATTORNEY GENERAL'S OFFICE,
February 19, 1868.

SIR: I have had under consideration the question submitted for my opinion by yours of the 3d of December, 1867, in relation to the claims of Messrs. Stover and Cheever, under contracts for the machinery of the steamships Miami and Tuolumne. You state that considerable sums of money are now due by the Government upon those contracts, and that payment is demanded by each of the above-named parties, Stover and Cheever. Their claims for payment are antagonistic to each other. The question you submit to me is, to which of these claimants you can lawfully pay the money.

It appears clearly enough, that the contracts for manufacturing the machinery were executed by a manufacturing corporation of New York, called the Stover Machine Works, the party of the first part, the United States being the party of the second part. Mr. Stover claims the right to receive the money, as president of that corporation, while Cheever claims the right to receive it, as treasurer of the corporation.

At the date of these contracts, in October, 1862, these

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parties undoubtedly held the offices: Stover the office of president, and Cheever the office of treasurer of the corporation. A by-law of the corporation, passed in July, 1862, provides, that it shall be the duty of the treasurer to receive and disburse the money of the company; but that all notes, checks, and contracts shall be signed by two of the officers of the company. The by-laws were amended in December, 1863; but in the amendment no modification of the duty of the treasurer to receive and disburse the money of the company was made.

A question has been made, whether Stover continues to be president, all his stock having been transferred. A further question has been made, whether Cheever can now exercise any authority as treasurer, there having been no election since March, 1864, of any officer; and in the month of February, 1864, it being resolved, at a meeting of the stockholders of the company, to wind up the affairs of the company, to sell out its effects, and to give to Cheever, the treasurer, authority to make conveyance and assignment of the property of the company of whatever character.

But the authority of that meeting to pass such a resolution is questioned by Stover, in whose name three-fifths of the stock then stood, who was not present at the meeting of the stockholders.

There is a volume of documents in the case in regard to the corporate transactions, and the claims of the respective parties to receive this money, involving many matters of fact, which I do not feel called upon to determine. But enough is shown in the case to satisfy me that you cannot safely pay this money to either of the present claimants, and that you should either require evidence of recent action taken by the corporation, giving authority to receive this money, or, in the absence of any corporate action, await a judicial decision settling the right in the case.

I am, sir, very respectfully,

Your obedient servant,

HENRY STANBERY.

Hon. GIDEON WELLES,

Secretary of the Navy.

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OPINIONS

OF

HON. O. H. BROWNING, OF ILLINOIS,

ATTORNEY GENERAL AD INTERIM,

APPOINTED MARCH 13, 1868.

CUSTOM-HOUSE LOT AT SAN FRANCISCO.

1. A sale or abandonment of this property by the United States would work a forfeiture under the grant from the State.
2. Though the United States have the right to remove the buildings erected on the premises, yet they are obliged to maintain a fit and suitable custom house thereon.
3. The Government by the terms of the grant has no power to lease the property, except for the purpose of carrying out the objects of the grant.

ATTORNEY GENERAL'S OFFICE,
March 19, 1868.

SIR: In your communications dated the 2d and the 17th of December last, the opinion of the late Attorney General was asked upon the following points, relating to certain real estate belonging to the United States, known as the "Custom House Lot" in San Francisco, California, and arising out of the terms of the grant heretofore made:

1. Whether a sale or abandonment of the property would cause the estate to revert absolutely to the grantor?

The grant was made by the State of California, by an act of the Legislature, and a conveyance executed by the Governor in conformity to the act recited therein. This act authorizes the Governor to execute and deliver a deed which "shall vest all the right, title, and interest of the State of California in and to said premises in the United States, for the purpose of erecting and continuing thereon

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a custom-house and other necessary buildings for the use of the United States, and for no other purpose; *Provided*, If the United States shall at any time hereafter sell or dispose of the property, or any part thereof, then the whole or part so sold or disposed of, as the case may be, shall revert to the State of California." This is the language of the Legislature; and in the deed of the Governor, although the language is descriptive of a fee-simple estate, yet in the *habendum* it is also said, "to have and to hold the same in manner and form as prescribed in said act."

The consideration is also expressed as being the half of the appraised value of the estate. It is, then, substantially a legislative grant, partaking of the nature of a dedication, for a perpetual public use.

In my opinion, either an abandonment or sale of the estate would be a breach of the condition subsequent. In the event of either sale or disposal, the grantor has prescribed, and the United States has agreed, that the estate "shall revert to the State of California." But the title of the United States would still be good until the grantor should re-enter the premises after breach of the condition.

2. The second question is, whether, in case the right to alienate the land does not vest in the United States, they have the right to remove, sell, or otherwise dispose of the buildings and appurtenances thereupon erected at their expense?

The express object of the grant is the "erecting and continuing on the land a custom-house and other necessary buildings for the use of the United States, and for no other purpose;" and this object is further secured by the conditions against alienation. I do not perceive that any restriction operates upon the United States as to the character, extent, or permanency of any particular structure which, in the exercise of their constitutional discretion, at one time they may have erected, and, in the exercise of the same discretion, at another time, they might choose to change, remove, sell, or supplant with new structures; provided, of course, that the discretion in any case would be

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exercised in furtherance of the purposes of the grant, as expressed therein.

The words, "erecting and continuing thereon a custom-house and other necessary buildings," do not seem to me to constrain the United States to "continue" any particular building; but ought to be taken to import that there shall be, and shall ever afterwards continue to be, upon the lot a fit and suitable custom-house and other necessary buildings for the use of the United States.

3. The last question is, whether the Government has the power to lease the property, and, if so, whether there is any limit as to time?

The grant provides for a reversion to the State of California, should the United States "at any time hereafter sell or dispose of the said property, or any part thereof."

The property which the United States is thus prohibited from disposing of is evidently the property granted; and any disposition which the United States might deem necessary and proper for the purpose of erecting and continuing a custom-house and other necessary buildings, for the use of the United States, and for no other purpose, would seem consistent with the objects of the grant, even though that disposition involved the relation of landlord and tenant with third persons; for it would not be disposing, in such manner as to violate the conditions of the grant, of any part of the property granted, but using the property in a manner consistent with the title.

The probability, however, that the purposes of this grant would be furthered by leasing the land is a question of means to ends. If not, the leasing would be using the land for purposes other than those prescribed, and would be unauthorized by the terms of the grant, and followed by forfeiture.

If such leasing could be made tributary to the prescribed purposes, however, I have no doubt that it would be admissible, and, if admissible, on the like principle there need be no restriction as to time, beyond the specific term which distinguishes a leasehold from a higher estate in lands.

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Such term, however, would doubtless render the lease more and more irreconcilable with the prescribed uses of the land as its term of years should be made greater; and it is possible that a term of maximum duration would expose the title of the Government to some risk.

In conclusion, I will add, that as the grant itself, upon the conditions expressed, was the act of a State in its sovereign capacity, it is competent only for the State which imposed the conditions to release them. It will therefore be prudent, if practicable, to procure from the State of California, by legislative act, a release of such conditions as may tend to impede the free use and enjoyment of the estate for the purposes prescribed by the grant.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

THE DETROIT HOUSE OF CORRECTION.

This institution is within the principles of the opinion of Attorney General Stanbery, of October 14, 1868, which declares, that articles manufactured by convict labor in the penitentiaries of a State, for the use of the State, are exempt from taxation under the internal revenue laws.

ATTORNEY GENERAL'S OFFICE,

March 30, 1868.

SIR: In your letter of the 27th of December last, the late Attorney General is referred to his opinion of the 14th of October last, which concludes as follows:

"I am accordingly of opinion, first, that neither railroads owned by a State, nor the gross earnings thereof, nor the profits accumulated therefrom, nor the dividends paid upon its bonds, nor, secondly, articles manufactured by convict labor in the penitentiaries of a State, for the use of the

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State, or on account of the State, are subject to taxation, either under the act of 1864 or any other of the internal revenue laws."

You thereupon inquire whether he regards "county prisons, city or town houses of correction, or other city, town, or county institutions, manufacturing or producing goods, wares, merchandize, or articles liable to taxation, whether by convict labor or otherwise, as 'manufacturers,' within the meaning of the internal revenue laws?"

The distinction between "State institutions" and "city, town, or county institutions," is one which could not, in this country, be satisfactorily propounded in the abstract; and, until recently, no specific case has been submitted to this office. My attention has been called, however, to the case of the Detroit house of correction, an institution located in the State of Michigan, whose officers, as the Commissioner of Internal Revenue states in his letter to you, of which you furnish a copy, have refused "longer to make returns or pay taxes on articles manufactured by the labor of its inmates for sale."

The question, then, which was before the late Attorney General, is, whether the Detroit house of correction is within the principles of his opinion of the 14th of October, 1867?

I have carefully read that opinion, and believe it to be a correct exposition of the statutes therein mentioned, and I adopt the conclusion, that "articles manufactured by convict labor in the penitentiaries of a State, for the use of a State, or on account of the State," are exempt from "taxation, either under the act of 1864 or any other of the internal revenue laws," upon the principles and substantially for the reasons given by Mr. Stanbery; and that these ought to extend to any institution, by means of which the State effects purposes similar to those for which State penitentiaries are established, is but allowing the State its unquestionable choice of means to appropriate ends.

It might appear most expedient in a State to institute a

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general prison for convicts, to be in exclusive charge of officers having no local responsibility, and accredited by the State in commissions having the highest solemnity; or it might appear more expedient to dispense entirely with what are known as "State prisons," and remit to each county or municipality, under very general State supervision, the punishment and reformation of its own convicts; or it might please the State to adopt a system partly central and partly local. In any view, if the end be the same, it is certain that the means have not been interfered with by the general Government under its constitutional right of indefinite taxation. The same may be said of any other institution through which a State may exercise its powers for such public objects as are acknowledged to be essential. It is not to be understood, however, that every public institution, which may enjoy the encouragement and patronage of the State authority, is thereby made an instrumentality for essential State purposes.

But the Detroit house of correction seems to me to be an agency whereby the policy of the State of Michigan, for the protection of society against crime, is regularly administered under her laws. It appears that, by a recent act of the legislature, all convicts who are females are required to suffer their imprisonment in this institution, except those convicted of murder, and that, with the exception of convicts of murder and treason, all other convicts may, at the discretion of the State prison inspectors, and with the consent of the authorities of this institution, be confined therein, instead of in the State prison proper. It is said also that, by act of the legislature, this prison is designated as the place of confinement of all persons convicted in the federal courts for the district of Michigan of offences against the laws of the United States.

The act Congress of March 3, 1835, (4 Stats., 777,) provides, that persons sentenced in the United States courts to fine or imprisonment may, with the consent of the State or Territory in which the institution is located, be sent to houses of correction, etc.

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While the act of the Michigan Legislature, and the acceptance of the privilege by the United States through their courts, do not make this house of correction a State institution, it is clear that, by punishing their convicts in it in accordance with the act of Congress, the United States would be recognizing it as an appropriate instrument for the administration of their own laws, including those for enforcing the payment of revenue; and as such it is not probable that they would, in the same laws, treat it as so far a private institution as to be classed with manufacturers.

To all this may be added, that the establishment, though in important respects local, is altogether public; and its officers profess, and I do not doubt with candor, that the labor performed is exclusively in furtherance of the discipline of the institution.

In my opinion the Detroit house of correction is not a "manufacturer" in the sense of the revenue laws of the United States.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

LAND AT PUNTA DE LOS REYES, CALIFORNIA.

Where the President, in 1854, directed that a tract of land in California be reserved for light-house purposes, and there was a subsequent judicial confirmation of a claim to this tract, under a grant from Mexico, and the United States, in 1860, issued a patent to the grantee in pursuance of this confirmation, which patent did not mention the fact of the existence of this reservation, it was *held*, that the patentees were entitled to the possession of the land as against the United States.

ATTORNEY GENERAL'S OFFICE,

April 8, 1868.

SIR: I have the honor to acknowledge the receipt of your letter of the 30th September last, transmitting, at the

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instance of the Light-House Board, certain papers from the Commissioner of the General Land Office, in reference to the title to a piece of land at Punta de los Reyes, California, desired for a site for a light-house authorized by act of Congress, and requesting my opinion as to the legality of the occupation of the land for the purpose indicated, in view of the original reservation and subsequent patent to private parties.

The papers transmitted are, first, a copy of a letter of 19th August, 1854, addressed by the secretary of the Light-House Board to the then Commissioner of the General Land Office, reciting that Congress had, at its late session, made appropriations for light-houses at certain points on the Pacific coast, of which Punta de los Reyes was one, and requesting that reservations be made at such of them as had not already been made; second, a diagram, on which is endorsed a copy of an order of President Pierce, dated 11th September, 1854, directing that the tracts shaded in blue, among which is said Punta, be reserved for light-house purposes; third, a letter from the Commissioner of the General Land Office, dated 4th September, 1867, from which it appears that a patent for the whole tract was, on the 14th June, 1860, issued by the United States, and that the patent does not mention the fact of the reservation made by said order of the President for public purposes.

A copy of the patent does not accompany your communication, nor does it appear in whom the ownership of the tract covered by the patent is now vested, or under what circumstances the patentee acquired title thereto. In a postscript to the Commissioner's letter, I notice the following statement: "Although the light-house reservation is not specifically mentioned in the patent, yet, in the said patent for the Mexican claim, there is the following general reservation: 'But with the stipulation that, in virtue of the 15th section of said act, (act of March 3, 1851,) the confirmation of the said claim and this patent shall not affect the interests of third parties.'

"As the United States have the same civil rights and

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remedies as individuals, the above-mentioned reservation is, in our opinion, broad enough to protect them in the premises in question."

I infer, therefore, that the Mexican government granted, in due form, the whole tract to the patentee by an incipient and unperfected title, which was subsequently adjudicated and confirmed by a decree of the proper tribunal under the laws of the United States, and that a patent issued pursuant to such decree, conveying to him the land in full property.

I shall not discuss the right of Spain or Mexico to reserve parts of the public domain as sites for military or other public uses. The authority of the President to set apart for such uses portions of the lands belonging to the United States, although not often seriously questioned, has been recently asserted by the Supreme Court of the United States; but the right or authority in either case must be exercised during the period when the lands remain within the disposing power of the Government. The act of 3d March, 1851, provided for the ascertainment and confirmation of valid claims founded upon "any right or title derived from the Spanish or Mexican governments." The decision of the authority appointed for the purpose was final and conclusive as between the claimant and the United States. It does not appear that Mexico had in this instance any remaining interest in the granted premises, or that the claim of the patentee was subject to any condition, or subordinated to any public use.

The United States assured to him the same title as Mexico would have conveyed had the jurisdiction and sovereignty of the territory ceded by the treaty remained unchanged. The patent is, by the 15th section of the act, conclusive between the United States and the claimant.

The rights of the respective parties must be determined by that instrument, and the United States, having thereby conveyed an absolute and complete title in fee to the whole tract, are estopped from setting up a claim to appropriate a part of it to public uses.

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In the view I take of the facts presented, I need not consider the effect of President Pierce's order.

Conceding its validity and binding force, had no adjudication been made, and no patent subsequently issued, it appears to me that the patentee and those claiming under him are, under the circumstances, entitled to the occupation of the land in question as against the United States.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

PAY OF RETIRED OFFICERS ASSIGNED TO DUTY.

An officer of the army retired under the 32d section of the act of July 28, 1866, is entitled to the full pay and allowances of the rank upon which he is retired when assigned to duty.

ATTORNEY GENERAL'S OFFICE,

April 14, 1868.

SIR: I have the honor to submit my opinion upon the question referred to this office by your endorsement of the 24th of January last, upon a letter of the Second Comptroller of the Treasury, dated December 19, 1867, enclosing a copy of his decision relative to a special class of military persons in retirement.

The retired list of the army is a branch of the "military peace establishment of the United States," a term usually employed in the public statutes to denote the regular army. Officers whose names are upon that list are necessarily "regular officers" under existing laws, because no provision is in force in the army for any kind of retirement but that which is made a systematic part of the permanent establishment. The system is developed in several statutes, which should be considered together as one law, in order to a correct understanding of any particular provision.

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Pay of Retired Officers Assigned to Duty.

The act of August 3, 1861, after providing for certain officers who may retire upon their own application, requires that all officers who have, in the opinion of a board and of the President, become incapacitated, shall be placed upon the retired list: some upon a limited pay, and others with the pay proper of the highest rank held by them at the time of retirement, whether by staff or regimental commission, and, in addition, four rations per day. This provision is made for officers whose disability is found to have arisen from the incidents of faithful service, as, for example, wounds in battle. They are to be withdrawn from active service and from the line of promotion, and their places are to be filled by the next in rank, according to the rules of the service.

This act provides, however, that the President may assign them to duty, as may seem fit and as public exigency may require. But no provision was made for any enhancement of pay during such performance of duty. (12 Stats., 289.)

The act of July 17, 1862, makes provision for superannuated officers, and authorizes the President to assign them, and also officers retired under the above act, to "any appropriate duty," and provides that while on such duty they shall receive the full pay and emoluments of their respective grades. (12 Stats., 596.)

It will be observed that in the foregoing acts the language indicates the rank which an officer in retirement may hold by prescribing what pay he shall have, *i. e.*, "the pay proper to the highest rank held by him," etc. In this respect, the following act, under which this question arises, is different. It makes no express mention of pay, but provides expressly for the rank. In the one case, the rank is left to follow the principal pay as of course; in the other, the pay follows the rank. In both, however, rank and pay are correlative.

The 32d section of the act of July 28, 1866, entitled, "An act to increase and fix the military peace establishment of the United States," provides that, "officers of the regular

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army, entitled to be retired on account of disability occasioned by wounds received in battle, may be retired upon the full rank of the command held by them, whether in the regular or volunteer service, at the time such wounds were received." (14 Stats., 337.)

The question before me is thus stated: "Is an officer of the army retired in accordance with this section entitled to full pay and allowances of the rank upon which he is retired when assigned to duty?"

It will be remembered that, if so assigned, it must be under the act of 1862, and that act prescribes that he shall be entitled while on such duty "to the full pay and emoluments of his grade." The above question, therefore, is simply, what is "his grade?"

I think it is now clear that this question has grown out of confounding retired grade or rank, as specially prescibed, with active grade or rank, as consequent upon commission, mistaking the correspondence of retired with previously commissioned rank, under the preceding laws, for a necessary dependence of the former upon the latter under the new law.

This law makes no substantial change except in the criterion both for rank and pay, which, for the particular class contemplated in it, is no longer a correspondence with the commission held by the officer at the date of retirement, but a dependence upon the magnitude of the command held by him at the long anterior date of his receiving the disabling wounds.

As used in the statutes above referred to, "rank" and "grade" are convertible terms. They mean the same thing, and, as a general rule, are determined, in respect to officers on the active list, by the commission. If an officer be commissioned as a captain or colonel, his "rank" or "grade" in the army is that of captain or colonel, as the case may be, in the absence of any provision of law to the contrary, and his pay corresponds to his "rank" or "grade." So, too, the pay of a retired officer, when assigned to active duty, is made to correspond with his rank

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or grade, but his "rank" or "grade" does not necessarily depend upon or follow his commission. On the contrary, by express provisions of the act of July 28, 1866, above quoted, his retired "grade" in the regular army is made to depend upon and correspond with the "command" he held when the wounds on account of which he is retired were received, whether that command was in the regular or volunteer service, and without any reference to the correspondence of the command with his commission in the regular army. He goes into retirement as an officer of the regular army with the full "rank" of that "command," whatever it was. And that "rank" is thereafter his grade as a retired officer, and he has no other. He is no longer an officer on the active list, and of course can have no grade as such.

The place he once held as an officer on the active list is filled by another. He has been retired from the active list, and no provision has been made for restoring him to it. True, he may be assigned to appropriate duty, but he does not thereby resume the place which he has lost on the active list.

It is the *retired* officer who, under the act of 1862, is assigned to duty; the *retired* officer who performs the duty holding, whilst he does so, his "grade" as a retired officer, and entitled to be paid, during the time he may so continue on duty, according to that grade. What is that "grade?"

It is simply the "rank of the command held" by him when wounded, and upon which he was retired. If he held the command of a major general, he may be retired upon the rank of a major general; and, if so retired, his "grade" upon the retired list will be that of major general.

When assigned to duty, it is duty appropriate to the grade of a major general, and the pay must correspond to the same grade.

The only reason why a retired officer is capable of active duty at all, is because the laws expressly make him capable, not because he was or is a commissioned officer in the active branch of the regular establishment.

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His right to the pay and emoluments of an active officer depends, not upon his being one, but upon his doing the work of one for a time; and if the duty conforms to his grade as a retired officer, which the law prescribes, then according to the corresponding grade in active service he must be paid.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

The PRESIDENT.

CLAIM OF EZRA CARTER.

1. Where an account has been duly adjusted, settled, and closed, by the proper officers, upon a full knowledge of all the facts, and no errors in calculation have been made, it cannot be reopened without express authority of law.
2. Neither surveyors, not discharging the duties of collectors, nor naval officers, are entitled to extra compensation under the act of March 3, 1841, to be computed upon fees, emoluments, or storage not actually received and accounted for by them, and to which fees, emoluments, or storage they are not legally entitled.

ATTORNEY GENERAL'S OFFICE,

April 20, 1868.

SIR: I have received your letter of the 3d instant, in relation to the claim made for storage by Ezra Carter, sometime collector of customs at Portland, Maine, and carefully considered the report of the Commissioner of Customs as well as the other voluminous papers accompanying it.

It appears, 1. That the accounts of Mr. Carter, as such collector, and embracing the period during which the alleged claim arose, were duly adjusted and closed, on the 19th day of February, 1858, by the proper officers of the Treasury, and that he was advised thereof by a letter of the same date.

2. In the examination and adjustment of those accounts, the accounting officers considered and construed the act

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of March 28, 1854, and the regulations made in pursuance of the 9th section thereof, (10 Stats., 270,) as essentially modifying the 5th and 6th sections of the act of 3d March, 1841, in that, as all the profits accruing from storage of merchandize in private stores or bonded warehouses inured to the owner or owners thereof, under their contract with the Government to pay all expenses of every description, including the stipulated compensation of an inspector or inspectors that might be detailed to supervise the receipt and delivery of said merchandize, no storage could accrue to the Government or to the collector within the meaning of the act of 1841.

3. No attempted appeal was taken, nor protest made by Mr. Carter, as to the basis on which his account was adjusted, nor did he claim, until nine years after the adjustment of his account, that any portion of the sum received for storage should be credited in his accounts as moneys received from the owners of private stores and bonded warehouses.

The 4th section of the act of March 3, 1795, entitled "An act for the more effectual recovery of debts due from individuals to the United States," (1 Stats., 442,) enacts: "that in all cases, when the final decision of the Comptroller shall be against the claimants, such determination shall be final and conclusive to all concerned."

The 12th section of the act of 3d of March, 1849, establishing the Bureau of Customs, enacts, that "the Commissioner of Customs" (by whom the accounts were adjusted) "shall perform all the acts and exercise all the powers now devolved by law on the First Comptroller of the Treasury, relating to the receipts from customs and the accounts of collectors and other officers of the customs or connected therewith."

A recent judicial decision disaffirms the rule of construction prevailing at the Treasury Department when these accounts were finally adjusted. Mr. Carter now insists upon a reopening of them, and claims the allowance of sundry charges for storage received by him during the

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fiscal years ending, respectively, June 30, 1856, and June 30, 1857, amounting to $2,739 50, although the items constituting these charges were credited by him to the United States.

I am of opinion that Mr. Carter's claim should be disallowed. I do not deem it necessary to refer specially to judicial decisions or to the opinions of successive Attorneys General on the reopening of a finally adjusted account.

It has been repeatedly held, that where an account has once been duly adjusted, settled, and closed, by the proper officers, upon a full knowledge of all the facts, and where no errors in calculation have been made, it cannot be reopened without express authority of law, but must be regarded as final and conclusive.

No subsequent decision upon a doubtful or controverted question of law, essentially modifying a prevailing rule which was applied to the settlement of an account, would authorize the reopening of it, with a view to a readjustment of it in accordance with such decision.

In reply to your concluding inquiry, I have the honor to state, that in my opinion neither surveyors, not discharging the duties of collectors, nor naval officers, "are entitled to extra compensation under the act of 1841, to be computed upon fees, emoluments, or storage not actually received and accounted for by them, as provided for under said act, and to which fees, emoluments, or storage they are not legally entitled."

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury

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BRANCH MINT AT NEW ORLEANS.

1. A sale or abandonment of this property would cause the same to revert to the grantor.
2. Any disposition or removal of the structures now on the land, inconsistent with the purposes of a branch mint on the site, would enable the grantors to avoid, by judicial proceedings, the right of the United States to the use and occupation of the premises.

ATTORNEY GENERAL'S OFFICE,
April 21, 1868.

SIR: In your letter of the 2d of December last mention was made of the property situated in San Francisco, called the "custom-house lot," and also of the site of the branch mint in New Orleans, and the papers relating to both were submitted, with the following interrogatories with respect to each, viz:

"1. Whether a sale or abandonment of this property would cause the same to revert to the grantor?

"2. Whether, in case the right to alienate the land is not vested in the Government, it may remove, sell, or otherwise dispose of the buildings which have been erected thereon at its expense?"

Under date of the 19th ultimo I had the honor to offer my opinion, under these questions, upon the California case. The Louisiana case is the subject of my present communication.

The land in question is included in a larger tract, which was claimed by the heirs of Claude J. D. Villars through a protracted litigation, which terminated in 1850 with a judgment of the supreme court of Louisiana in favor of the defendants. The effect of this judgment, as touching the present matter, was to sustain the title of the mayor, aldermen, and inhabitants of the city of New Orleans, grantors to the United States.

The act of conveyance was executed on the 19th of June, 1835, by the mayor of the city, thereto specially au-

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thorized by a resolution of the councils, to Martin Gordon, for the use of the United States. The substance of the resolution of the city councils is recited in the instrument of conveyance. It provided that this square of ground "be ceded to the United States for the express and only purpose of erecting thereon a branch of the mint of the United States, together with the necessary appendages; and that the mayor be, and hereby is, authorized to convey, by notarial act, to the said Martin Gordon, Esq., the commissioner appointed by authority of the said United States to superintend the erection and building of said mint, the use and occupation of the said square for the purposes aforesaid." Also that, "should it hereafter be deemed necessary by the Government of the United States to remove the mint contemplated to be established, as aforesaid, or to cease to occupy it for such purposes, then the said act to be null and void."

No consideration is expressed, nor anything else to qualify these terms.

This is simply a donation of a use and occupation of the land for an express purpose, to be null and void for all other purposes. Considered in the light of the statute law of Louisiana and of the principles of the civil law, as they obtain in that State, the title of the United States might be defined to be a right to perpetual use and occupation of the land, subject to be dissolved in consequence of a prescribed event, depending on the will of the United States; or, in language approaching more nearly to that of the Code of Louisiana, the relation between the grantor and grantee in this case is that of parties to a commutative contract, with a resolutory condition, that in the event of a change of the purposes of the use and occupation, these contract relations shall cease to exist. (Code La., ed. 1825, art., 2040, *et seq.*)

Your first interrogatory, therefore, must be answered in the affirmative. But though the dissolving condition of the civil law has for its object to place matters in the same situation as if no engagement had ever been made, in the

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event of its taking effect, a species of condition with which none of those known to the common law exactly coincides, yet the Code of Louisiana provides against such a consequence following the mere supervention of the event contemplated in the condition in all cases where the event depends on the will of either party.

In this case it may be assumed that the event contemplated in the resolutory condition is dependent upon the will of the United States, viz: "Should it hereafter be deemed necessary by the Government of the United States," etc. The mere accomplishment of the condition would not, therefore, work a dissolution of the right of the United States, but it would be requisite for the adverse parties in interest to institute suit and procure a judicial decree in order to give them a right of entry. (*Ibid*, art. 2042, Noe v. Taylor, 13 La. Rep., 254.)

With regard to your second question, it would seem that, in addition to the discretion which the United States may exercise, limited only by the purposes contemplated in the conveyance, the Code of Louisiana would warrant the removal, sale, or other disposition of the buildings, etc., erected at their expense by the United States, at any time while they hold possession under this conveyance. In Louisiana, when a rightful owner of the soil recovers his title and ousts adverse possession, he does not thereby acquire, as of course, the right to all that has been attached to the freehold; but express provisions are made by law for a reimbursement of outlays or a removal of materials, according to circumstances. (*Ibid*, art. 500, Baldwin v. Union Ins. Co., 2 Robinson's Rep., 137.)

And until the right of possession has been finally adjudged against the occupier, I think, under the code cited, the latter could use his pleasure as to the structures made at his own expense, if his possession was *bona fide*. In the present case, the United States, in this view, may remove, sell, or otherwise dispose of the buildings in question, by virtue of the fact that the erection has been at their expense, and that the disposition so made takes effect before

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a judgment of eviction; but it should not be overlooked that, by the express resolutory condition contained in the instrument of conveyance, any disposition or removal of the structures now upon the land, inconsistent with the purposes of a branch mint on the site, would enable the grantors to prosecute to recovery a judicial proceeding for avoiding all the rights of the United States to the use and occupation.

I am, sir, very respectfully,
Your obedient servant,
O. H. BROWNING,
Attorney General ad interim.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

APPOINTMENT OF INSPECTORS OF HULLS AND BOILERS.

A designation by a majority of the board constituted under the act of August 30, 1852, of inspectors of hulls and boilers, and an approval of the designation by the Secretary of the Treasury, constitute the parties incumbents of those offices.

ATTORNEY GENERAL'S OFFICE,
April 27, 1868.

SIR: The question submitted in your letter of the 16th January last, and referred to in your subsequent communications of the 5th March and the 9th of this month, having been examined with due care, I have the honor now to offer my opinion.

It appears from a copy of the minutes of their session that a certain board, consisting of Albert Elmore, collector of the port of Mobile, William Rogers, supervising inspector of the tenth collection district, and Richard Busteed, judge of the United States courts for the southern district of Alabama, met at Mobile and took action "in the matter of the designation of an inspector of hulls and an inspector of boilers of vessels, etc., under section 9 of the act of Con-

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gress approved August 30, 1852." These minutes show that all the members of the board were present and participating in the proceedings, the record of which is signed by all of them, as they expressly say "in attestation of its correctness." The proceedings began on the 17th, and, being regularly adjourned over, were concluded on the following day, the 18th December, 1867. Among the minutes the following appears· "On suggestion of Mr. Elmore it is entered and agreed, that these proceedings for the designation of inspectors are held and taken in consequence of a decision of the district court of the United States for the State of Alabama, made at the December term, 1867, that the appointments of Ollis and Sheffield as local inspectors of steamers for the district of Mobile were not made according to law."

The minutes show that Judge Busteed laid before the board the application of John W. Youmans to be inspector of hulls, and the recommendations of sundry persons in favor of his appointment, but coupled the act with the statement that he did not propose any one for either of the offices for which designations were to be made. Judge Busteed also voted with the two other members of the board on several minor matters, and in the designation of an inspector of boilers voted for E. V. Sprague, the other members at the same time voting for J. B. Ollis; but upon the vote for designating an inspector of hulls the other members voted for Frederick Sheffield, but Judge Busteed appears not to have cast any vote.

Also an examination of the applicants which was made by the board was conducted mainly by Judge Busteed.

The result was the designation by the board, acting by its majority, of J. B. Ollis as inspector of boilers, and Frederick Sheffield as inspector of hulls, subject to the approval of the Secretary of the Treasury; and the question is, whether, if the Secretary approves such designation, the official acts of these persons will be "valid and binding in law?"

The papers disclose that Ollis and Sheffield have been

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acting as such local inspectors under designations which were made in 1865, without the participation of the United States district judge, but only approved by the Secretary of the Treasury.

It is said in explanation that the absence of the judge from the district, at the time when a designation of local inspectors became requisite for the port of Mobile, was the the occasion of his non-participation.

In 1867 the validity of the certificates issued by these officers was called in question in the United States district court, before Judge Busteed, by the extensive seizure and prosecution of vessels for a violation of the navigation laws. These suits, as I learn, have all been discontinued. I have no information of the decision made by the court, as referred to in the minutes above mentioned, beyond the fact as therein stated.

But assuming that such a decision was made, and became the occasion of the meeting of the board, the designations made by the majority of the board after that decision, though the same persons were designated, are now before me, unaffected, as far as known, by any judicial action. The importance of the functions of these local inspectors is shown by sundry provisions of the law prescribing their appointment, and by those which impose penalties upon all who conduct navigation in disregard of their inspections.

I am satisfactorily assured, moreover, that it has been the uniform practice of your department to accept the action of a majority of the board as a compliance with the statute, even when the minority protested. We are now prepared for the question.

The 3d section of the act of 7th July, 1838, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, makes it the "duty of the district judge of the United States within whose district any ports of entry or delivery may be, on the navigable waters, bays, lakes, and rivers of the United States, upon the application of the master or owner

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of any steamboat or vessel propelled in whole or in part by steam, to appoint, from time to time, one or more persons skilled and competent to make inspections of such boats and vessels and of the boilers and machinery employed in the same," etc., and prescribes the duties of such local inspectors. (5 Stats., 304.) Under this provision there was no designating board nor any supervisory power in the department.

The whole appointing power was vested in the judge of the district court. This is superseded by the 9th section of the act to amend the former, approved August 30, 1852 which provides:

"That instead of the existing provisions of law for the inspection of steamers and their equipment * * * the following regulations shall be observed, to wit: The collector or other chief officer of the customs, together with the supervising inspector for the district, and the judge of the district court of the United States for the district in each of the following collection districts, namely * *: Mobile, in Alabama, * * shall designate two inspectors of good character and suitable qualifications to perform the services required of them by this act within the respective districts for which they shall be appointed;" one to be called the "inspector of hulls," and the other to be called the "inspector of boilers." It is further provided, that "these two persons thus designated, if approved by the Secretary of the Treasury, shall be, from the time of such designation, inspectors, empowered and required to perform the duties herein specified." (10 Stats., 63.)

The inspectors under this act are not to be appointed by the judge of a court of law, as in the act of 1838, but their appointment is the exclusive act of the head of the Treasury Department, as Mr. Attorney General Bates has satisfactorily shown in his opinion of the 14th March, 1862, in which he advised Mr. Secretary Chase that he might lawfully exercise the power of removing such inspectors at his pleasure. (10 Opinions, 204.) The appointment takes the

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form of an approval by the Secretary of the Treasury of a designation made by others, under a provision which operates to restrict his sphere of selection, but, as Mr. Bates says, "it is this approval which gives force and effect to the designation and breathes into the action of the designating board the breath of official life.

The function, then, of the board created by the act of 1852 bears but slight analogy to that of an appointing power, but is to be treated as qualifying the conditions of the exercise of such a power by an authority (the head of a department) constitutionally competent to acquire it through an act of Congress.

The act of 1852 is mandatory upon the members of the board in the expression, they "shall designate." Unless the board designates "two inspectors, of good character and suitable qualifications," the Secretary of the Treasury cannot appoint such, and the important business of inspecting the hulls, boilers, and equipments of steam vessels, notwithstanding the elaborate provisions of law for the safety of passengers and like purposes, must be suspended.

But the collector, or principal officer of the customs, and the supervising inspector of the district, are officials who perform their duties under the supervision and control of the Secretary of the Treasury. The offices which they respectively hold are such that these particular duties harmonize with them. By force of the statute under consideration, a collector of customs becomes an officer whose duties are to collect the customs and to designate inspectors, etc. He may not omit the latter duty any more than the former.

Thus much for two of the board. It is otherwise with the third. His office is that of a judge. Only judicial duties are compulsory upon him. A duty, even in the nature of an adjudication, cannot be performed by him in his judicial character if his action therein is subject to any but judicial revision. (United States *vs.* Ferreira, 13 How., 51.)

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It follows, therefore, that the judge of the United States for the district may accept or decline the functions prescribed for him as a member of this designating board. The word "shall," as to him, must be taken, therefore, to be directory only. Under such circumstances, a majority of the board must be competent to exercise all the powers of the board, or else the statute has failed to establish the board. If the consent of the judge is necessary to the competency of the board, it is a competent board or not at the pleasure of the judge, since he is not compelled to act. It cannot have been the intention of this statute to make its own provisions on this subject inoperative without the independent sanction of another power; especially since these provisions were expressly enacted "instead" of those of the act of 1838, by which the appointing power was vested in the judge alone. Considering him in the character of a "court of law," his obligation to act had, at least, afforded a strong assurance that these inferior officers would be appointed by the court in which Congress had thought fit to vest their appointment, without executive revision. But the present act divested that power of appointment, vested it in the Secretary of the Treasury, reduced the agency of the judge to membership of a board of designators consisting of three, and excluded all judicial participation. If, now his dissent may invalidate the transactions, or his non-action destroy the constitution of the board, his influence in the matter would be greater after his powers had been vested in the Secretary of the Treasury and the board than when the whole had been lodged in himself; for then it was his duty to act, now it is his privilege not to act. Thus, looking only to the legislation on the subject, and to the consequences of a construction of these provisions which would render them ineffectual for their end, except with the free consent of an officer not subject to executive control, I am of opinion that Messrs. Ollis and Sheffield, when the designation which has been made of each of them by a majority of

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the board has been duly approved by the Secretary of the Treasury, will be legally the local inspectors for the district of Mobile; and as the statute expressly provides that "these two persons, thus designated, if approved by the Secretary of the Treasury, shall be, from the time of such designation, inspectors, empowered and required to perform the duties herein specified," their full official character and responsibility will extend back to the date of their designation. (10 Stats., 64.)

This result seems to me to be sufficiently clear, without recourse to doctrines which have been well settled touching the competency of a board charged, not with private, but with public business, notwithstanding a minority of its members may dissent from its determinations, acting by its majority, even where there is no inequality of status among the members of the board.

The principle appears to be, in the absence of statutory provisions to the contrary, that all members shall have equal notice and opportunity, and all are equally bound to form, each for himself, an opinion. But as they are not bound to agree with each other in opinion, yet are bound to pronounce a result, the opinion of the majority is the will of the whole. (Grindley *vs.* Barker, 1 Bosanquet and Puller, 229; 3 Term Rep., 592; *Ex parte* Rogers, 7 Cow., 527, and full notes following; 8 Cow., 544; 14 Johns., 560.) The rule is otherwise for a mere private purpose, as arbitration and the like. (Green *vs.* Miller, 6 Johns., 38.) But even in such cases, notable examples exist of the introduction of the majority principle by construction, where there has been no fraud or inequality of opportunity among the arbitrators. (Viner's Abdgt. Sup. I, p. 286; Kyd on Awards, 106, 107; Barnes' Notes, 57; 3 Term Rep., 592; 7 Cow., 402.)

The actual assembling of all the members of the board, and the actual participation of all in the proceedings of the session, including the voting for inspectors, and the authentication of the minutes on the occasion of the designation

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of Messrs. Ollis and Sheffield, seem to put the validity of that designation beyond doubt.

I am, sir, very respectfully,
Your obedient servant,
O. H. BROWNING,
Attorney General ad interim.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

CASE OF MURRAY, EDDY & CO.

Where parties are engaged in practicing gross fraud upon the public, through the agency of the mails, it is competent for the Postmaster General to adopt measures and issue instructions to the end of preventing the postal service from being made a means for the accomplishment of the unlawful purpose.

ATTORNEY GENERAL'S OFFICE,
May 5, 1868.

SIR: I have had under consideration the papers submitted with your communication of the 24th ult., together with those transmitted to me by the Third Assistant Postmaster General, on the 29th ult., relative to the detention, by the postmaster at Cincinnati, Ohio, of certain letters addressed to Murray, Eddy & Co. at that place, and received by him through the mails. It appears from these papers that two firms are engaged in the lottery business in the locality above named, under the style of "Murray, Eddy & Co.," the members of one of which firms reside in New York, and the members of the other live in Cincinnati; that the New York firm has been long established under that style, and for some years past has had a branch thereof located in Covington, Kentucky, a town on the Ohio river, directly opposite Cincinnati, which forwards and receives its business correspondence through the post offices at both these points, using box 647 in the office of the last-named place; that the Cincinnati firm has been but recently formed under the same style, has its place of business in that city, and carries on its business corres-

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pondence through the Cincinnati post office only, using box 860; that on the receipt of information by the department that the latter firm are issuing *fac similics* of the circulars and tickets of the other firm, for the purpose of deceiving the public, the postmaster at Cincinnati was directed to withhold the delivery of *all* letters addressed to Murray, Eddy & Co. until further instructed; and that the Cincinnati firm has since instituted legal proceedings against the postmaster of that city, for the recovery of such of the letters which have been received and withheld by him bearing the address of Murray, Eddy & Co. as are directed to box 860.

On substantially this state of facts I am requested to advise the Postmaster General "as to the proper course to be pursued by the postmaster in the premises."

The subject presented for my consideration does not seem to be a question of law, but rather one of official duty on the part of a postmaster under particular circumstances. By the act of March 3, 1825, (4 Stats., 102,) the Postmaster General is required to "give his assistants, the postmasters, and all other persons whom he shall employ, or who may be employed in any of the departments of the General Post Office, instructions relative to their duty." Thus it will be seen that the "course to be pursued" by the postmaster at Cincinnati, in so far as it partakes of an official character, is a matter falling wholly within the administrative duty of the Postmaster General to consider and determine.

But I may observe, in connection with the case generally, that where parties are engaged in practicing a gross fraud upon the public through the agency of the mails, it is competent for the Postmaster General to adopt measures or issue instructions to the end of preventing the postal service from being made a means for the accomplishment of the unlawful purpose. The right of the department thus to interpose for the protection of the public is well stated by Attorney General Black, in an opinion dated July 24, 1860, (9 Opinions., 454,) in whose views I entirely concur.

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To justify the adoption of preventive measures, however, the evidence of the dishonest scheme and fraudulent intent ought to be very clear. The department cannot properly interfere with the delivery of letters merely with a view to protect one party from damage consequential upon the use of its name, style, or trade-mark by another party. Protection or relief in such a case should be sought from the courts.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

Hon. A. W. RANDALL,

Postmaster General.

FEES OF COUNSEL OF DEPARTMENT.

This matter is under the exclusive control of the department employing the counsel.

ATTORNEY GENERAL'S OFFICE,

May 5, 1868.

SIR: I have the honor to return herewith a letter from Hon. Caleb Cushing, dated 27th ult., addressed to you, respecting his compensation for professional services rendered and to be rendered your department, and also an opinion of the examiner of claims in your department, to the effect that the proposed compensation would be reasonable, and ought to be allowed. These papers came with your letter of the 28th ult., addressed to me, in which you say that you transmit them "with a request that you will return the same to this department after your consideration of the subject."

Upon inspection of these papers, it does not appear that their subject-matter has any relation to any suit in the Supreme or any inferior court of the United States, nor to the duty of supervising district attorneys or marshals, or

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employing counsel to assist district attorneys, nor to land titles, nor to pardons, nor to any special duties which have been devolved by statute or usage upon the Attorney General. On the other hand, no question of law is stated, nor does anything in the nature of such a question appear to have arisen in the case. Under these circumstances I do not feel warranted, as Attorney General, to take the subject into consideration.

The case seems to be simply a claim for a *quantum meruit* arising upon a contract competently made between the Department of State and a distinguished lawyer for the services of the latter in a public business within the province of the former.

With deference, I think it must be obvious that I could not, with propriety, give an official opinion in the premises.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

Hon. WM. H. SEWARD,

Secretary of State.

CASE OF HARTFORD NATIONAL BANK.

A national bank is not liable under the internal revenue laws to the tax of five per centum upon the dividends due a State on stock owned by the State.

ATTORNEY GENERAL'S OFFICE,

May 8, 1868.

SIR: In your letter of the 4th November last, you recite the following provision of law, and, after mentioning the fact that the State of Connecticut is represented to be the owner of a certain amount of stock in the Hartford National Bank, and consequently entitled to the dividends thereon, you ask to be advised whether the bank is liable to the tax of five per centum upon the dividends due the State?

. . .

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As amended, the law is now in the following terms:

"That there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable to stockholders, policy-holders, or depositors, or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or Territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year, to their surplus or contingent funds; and said banks, trust companies, savings institutions, and insurance companies shall pay the said tax, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable, as aforesaid, the said tax of five per centum," etc.

A list or return, containing a true account of the amount of taxes, verified by the oath or affirmation of the president, cashier, or treasurer of the bank, etc., is to be made and rendered within a stated time; and for any default in making or rendering such list or return, so verified, a penalty is imposed on the bank, etc., in default, to be collected in accordance with the general provisions of the law in other cases of neglect and refusal. (13 Stats., 283; 14 Stats., 138.)

Also, in your subsequent letter, of the 29th of February, 1868, you transmit a copy of a recent communication relating to this subject, addressed from the Commissioner of Internal Revenue, wherein that officer observes, that there seems to be a distinction between the present case and the one on which Mr. Attorney General Stanbery gave an opinion, of the 14th of October last.

But in that opinion I find that one of the questions considered is, whether railroads owned exclusively by a State

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and operated by its own agents fall within the provisions of the internal revenue act of June 30, 1864.

The particular provisions of this act, cited by Mr. Stanbery as having direct application to the question then before him, are sections 103 and 122, (13 Stats., 275, 284,) in connection with which he has also referred to and considered the declaratory provision contained in the latter clause of the 44th section of the act of July 13, 1866, (14 Stats., 163;) and it is remarked, in the opinion given by him, that the first of these sections, which lays a duty upon the gross receipts of railroads, imposes this tax not upon the road, but upon the person or corporation owning the same. The same remark may be applied to the next section, which it will be observed imposes upon railroad companies, and not upon their respective roads, the tax laid upon interest payable on their bonds upon dividends declared due and payable to their stockholders, and upon all their profits carried to the account of any fund, or used for construction.

The conclusion reached by Mr. Stanbery is, that a State is not comprehended within the description of owners named in these sections, as extended and defined by the declaratory provision aforesaid. "Standing, then," he adds, "upon the language used in these sections alone, I am of opinion that they do not authorize a tax upon the gross profits of a railroad owned by a State, or upon interest payable upon its bonds, if it have any outstanding, or upon its accumulated profits."

But other considerations are mentioned by him as confirmatory of this view, among which appear the following: 1st. The clear manifestation of the policy of Congress, as shown in the direct tax law of August 5, 1861, placing the property of a State upon the same footing of immunity against federal taxation as similar property of the United States. 2d. The absence of any legislation indicating an intention on the part of Congress to tax the income or revenue of a State. In connection with the latter circumstance, the late Attorney General says:

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"The income of a railroad owned exclusively by a State forms one branch of its revenue, and may be very essential for the support of the State; and it would be a very singular provision for Congress to lay a tax for the support of the Federal Government chargeable upon the revenue necessarily appropriated for the support of a State government.

The same principle which denies to a State power to raise a revenue by taxation on federal property, or sources of revenue, or means of carrying on its duties, would equally forbid taxation of State revenue for federal purposes. The continued existence of the State governments in all the powers necessary for their support is just as essential to our Federal system as the continuance and support of the Federal Government. Nothing but the clearest expression could satisfy me that Congress, in the internal revenue acts, has had any purpose to interfere with the appropriate means through which a State draws its revenue for its own support."

These considerations would seem to be fully as applicable to the case now in hand as they are to that which formed the subject of the opinion in which they are expressed. Here the subject on which advice is asked is virtually a question of intention on the part of Congress to lay a tax on income accruing to a State from its property in a bank; there one of the points on which advice is given involved a question of legislative intent as to a tax on income derived by a State from its property in a railroad. The two cases bear not only a close resemblance in their features or circumstances, but the particular provisions of law that separately apply to each are similar in their terms.

Thus, amended section 120 of the act of 1864, under which the present case arises, charges banks, trust companies, savings institutions, and insurance companies with a tax on dividends declared due and payable to their stockholders, etc.; while section 122 of same act, the construction whereof was involved in the former case, charges railroad, canal, turnpike, canal navigation, or slack-water

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companies with a corresponding tax on dividends declared due and payable to their stockholders, etc.

Each of these sections will be found to belong to that particular branch of the internal revenue laws which regulates taxation on incomes and provides for its collection. The sole purpose of this branch of legislation is to obtain a revenue to the General Government from income duties; and, in order to effectuate that purpose, Congress has deemed it expedient to vary the operation of the law in different cases. Accordingly, in some instances we find that the mode is adopted of collecting the tax immediately from the party by whom the income has been received, while in others the plan pursued by the statute is, as in those instances before us, to collect it indirectly through the party by whom it is payable. But this exhibits only a difference in the means employed to attain the end contemplated by the law.

Congress having expressly exempted the property of a State from federal taxation under the direct tax law of 1861, and manifested in no way any design or purpose, in the internal revenue acts subsequently passed, to impose duties upon the income or revenue of a State from whatsoever source derived, it may, I think, be safely said that the case under consideration does not come within the intended operation of those acts. And if the legislative intent was *not* to subject State income to taxation under the internal revenue acts, (a position which, on grounds already so forcibly stated by the late Attorney General as above quoted may be fairly assumed in the absence of a very clear expression to the contrary,) then it obviously follows, that this income must be equally free from the burden, whether the mode or means adopted by the statute for the collection of such taxation be of the direct or indirect kind.

Upon the whole, I perceive no essential distinction between the present case and the one heretofore considered in this office, to which reference has been made, and I arrive at the conclusion, that dividends declared to be due

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and payable on bank stock owned by a State are to be deemed a part of the income of the State; that as such they are not within the provisions of the income tax law; and that the bank, therefore, is not liable, under said law, for the payment of a tax on such dividends.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

CLAIM OF MRS. JENNINGS.

The joint resolution of March 2, 1867, prohibiting payment to any person not known to have been opposed to the rebellion, does not affect the payment of certificates of funded stock issued under the act of October 13, 1848.

ATTORNEY GENERAL'S OFFICE,

May 8, 1868.

SIR: I have considered your letter of the 14th of May, 1867, enclosing two certificates of funded stock bearing date October 13, 1848, one payable to Mrs. Anna M. Jennings, of New Orleans, Louisiana, or her assigns, and the other payable to her late husband, R. N. Jennings, upon whose estate letters testamentary have been granted to her.

You submit for the opinion of the Attorney General the question, "Whether and how far the payment of bonds of this character, and of the interest upon them, is affected by the joint resolution of Congress prohibiting payment by any officer of the Government to any person not known to have been opposed to the rebellion and in favor of its suppression, approved March 2, 1867."

The act under which the certificates were issued is entitled, "An act authorizing the issue of Treasury notes, a loan, and for other purposes." (9 Stats., 118.) They

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bear interest, are made transferable on the books of the Treasury, and are declared to be redeemable "after the last day of December, 1867." The proceeds of the sales of the public lands are moreover pledged for their payment, both principal and interest. They form a part of the public debt of the United States, and belong to that class of public securities which are known in financial circles as "registered bonds."

I am of opinion that payment of such securities or of the interest due thereon is not affected by the joint resolution to which you refer.

Although the word "demand" is of an import not only very comprehensive, but greater than that of any other except "claim," I am not aware that either of these terms has been employed by Congress as descriptive of our national securities, or of the rights of the holders thereof. Ordinarily we do not apply them to designate bonds of the United States; but in reference to the Government confine their signification to disputable, unliquidated, and unadjusted obligations. The 1st section of an act entitled "An act to prevent frauds upon the Treasury of the United States," approved February 26, 1853, (10 Stats., 170,) declares, that all transfers or assignments thereafter made of any "claim against the United States," and all powers of attorney, orders, or other authorities for recovering payment of any such claim, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses, after the ascertainment of the amount due, and the issue of a warrant for the payment. The 7th section prescribes that the provisions of that act and of a preceding act shall extend and apply to "all claims against the United States," whether allowed by special acts of Congress, or arising under laws or treaties, or "in any other manner whatsoever." The settled construction of this act has excluded from its operation liabilities created by an express stipulation of the Government to pay a specific sum of money, or where an ascertained sum is confessedly due, and confined it to

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obligations of the character to which I have before adverted.

The practice of the executive departments in giving this restricted meaning to the term "claims" has been sanctioned by the acquiescence of Congress, although the act, like the joint resolution in question, might have received so broad an interpretation as to render its stringent and exceptional provisions applicable to the holders of evidences of our public debt.

The negotiability and market value of the securities issued prior to April 13, 1861, would be seriously affected if the holders thereof are embraced by the terms of the joint resolution. Such would be the inevitable result if every bond-holder, whether resident or foreign, (for the terms of the joint resolution apply to all alike,) be required to establish to the satisfaction of the officers of the Treasury, before receiving payment of the interest or principal, that he never "promoted, encouraged, or" in any manner sustained the late rebellion. "And that during said rebellion he was known to be opposed thereto, and distinctly in favor of its suppression." A new condition would thus be imposed upon the holder which would essentially impair the obligation of the contract. The right to confiscate private debts, or private property in banks or in public funds, due or belonging to the enemy, while recognized by the Supreme Court, its exercise in time of war has, in the language of Chancellor Kent, "been condemned by the enlightened conscience and judgment of modern times." Vattel observes: "The State does not even touch sums which it owes to the enemy; everywhere funds confided to the public are exempt from confiscation and seizure in case of war." A fitting regard to the inviolability of the public faith and the maintenance of the public credit has protected such securities in the hands of actual enemies in time of war.

The right of such enemies, suspended only during hostilities, may, on the termination of them, be maintained in all its original vigor, without being fettered by any new

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conditions. I cannot concede that Congress, by legislation, in time of peace intended to interfere in any manner with the payment of the public debt. No such presumption can be entertained until their intent shall have been unequivocally manifested. There is nothing in the joint resolution which in my opinion applies to the holders of our public bonds.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

ABSENCE OF DIPLOMATIC AND CONSULAR OFFICERS.

1. The diplomatic appropriation act of March 30, 1868, disallows the salary of a diplomatic or consular officer in all cases of absence where, in any one year, the officer shall already have enjoyed absence, with salary, equal to sixty days of time.
2. The compensation of vice consuls and vice commercial agents does not stop during the absence of their principals.

ATTORNEY GENERAL'S OFFICE,

May 21, 1868.

SIR: I have considered the questions presented in your communication of the 15th instant, respecting the operation of the 3d section of the diplomatic appropriation act of March 30, 1868, which is in these words:

"That no diplomatic or consular officer shall receive salary for the time during which he may be absent from his post, by leave or otherwise, if such absence shall exceed sixty days in any one year."

By the settled construction of the laws existing prior to the passage of this act, the absence of a diplomatic or consular officer from his post of duty was not attended by any abatement of salary or compensation if the absence was in accordance with leave first had and obtained from

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the President, or was occasioned by sickness, however protracted the absence might be in either case. An absence not occasioned by sickness, and without leave, was indulged in like manner, but only for the period of ten days. An absence, however, which exceeded ten days in duration, without sickness and without leave, subjected the officer to the loss of his salary for the period of the excess over ten days. This is the view taken of the law by Mr. Attorney General Black, in his opinion of the 27th of April, 1858. (9 Opinions, 138.)

The 8th section of the act of March 1, 1855, (10 Stats., 623,) and the 19th section of the act of August 18, 1856, (11 Stats., 59,) contain the statutory provisions which precede the one now in question. The former, contemplating an absence "from the country to which" the officer was "accredited, or from his consular district," disallowed his salary, whether he had obtained leave or not, except where the absence was of ten days or less. The latter act, contemplating an absence "from his post, or the performance of his duties," for a longer period than ten days, and without leave of the President, provides, that "no compensation shall be allowed for the time of "any *such* absence in any case, except cases of sickness." But for absence not thus defined, as, for example, absence on leave of the President previously had, the salary, in Mr. Black's opinion, with which I concur, was to be allowed. To this construction the practice of your department seems to have conformed.

Such being the law and the practice when the recent statute took effect, I am of opinion that its true intent and meaning are to disallow the salary in all cases of absence, including cases of sickness as well as cases of leave, where, in any one year, the officer shall already have enjoyed absence, with salary equal to sixty days of time, whether that maximum be composed of several intervals of absence, or be a part or the whole of a continuous absence; but that the existing laws and practice are unchanged in respect to absence with or without leave, and to compensation during

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the same, except that whenever it comes to pass that the aggregate amount of absence during any one year's time of official incumbency exceeds sixty days, a proportion of salary corresponding to the excess over that aggregate of time for said year shall be withheld.

The words of the new law, it is true, appear to be descriptive of only one kind of absence, and that a continuous term which shall be longer than sixty days. But a construction so literal as to confine it to instances of absence of longer duration than sixty days would reserve it from all shorter terms, though they might in the aggregate absorb most of the year; and, on the other hand, would deprive the officer continuously absent sixty-one days, by leave of the President, of his salary for any part of the time.

I think it clear, therefore, taking the several statutes together, that the later one is applicable exclusively to an excess over a limited aggregate of absence at one or more times during any one year, that aggregate being sixty days.

You also inquire for the effect of the new law upon the compensation of vice consuls and vice commercial agents, when such officers are acting during the temporary absence of their principals.

By the 15th section of the act of 1856, (11 Stats., 57,) provision is made for the pay of those officers when acting for the principal officers; and this compensation is to be "the whole or so much of the compensation of the principal consular officer, in whose place he shall be appointed, as shall be determined by the President, and the residue, if any, shall be paid to such principal consular officer."

The vice consul or vice commercial agent, then, is to be paid out of the regular compensation of the principal officer, whatever that may happen to be. If, by reason of the latter's absence in excess of sixty days, his own salary stops, the question is, whether the compensation of the person who fills his place is so dependent upon his that it must also stop? I think not. There does not seem to me to be

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any dependence of the one compensation upon the other. In ascertaining the value of the vice consul's services, the law adopts the compensation of the principal consular officer as a standard of comparison, subject to a limited discretion of the President; but not as an interest upon the existence of which must depend the right of the vice consul to be compensated for his services.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

Hon. WM. H. SEWARD,

Secretary of State.

THE PASSENGERS ON THE SCHOONER "DART."

1. The act of Congress of February 28, 1803, prohibiting the importation of certain persons of color into certain States of the Union, is not repealed by the XIIIth amendment of the Constitution or the civil rights act of April 9, 1866.
2. The laws of the State of Florida, of November 22, 1829, and February 10, 1832, so far as they apply to colored British subjects, are not repugnant to the constitutional amendment or the civil rights act.

ATTORNEY GENERAL'S OFFICE,

June 5, 1868.

SIR: I have carefully considered your letter of the 12th of November last, informing me that the British chargé d'affaires represented to your department that three colored British subjects, on their arrival at Key West, in Florida, as passengers on board the British schooner "Dart," had been arrested, and that the master of the vessel had narrowly escaped prosecution.

It further appears from a letter of the district attorney of the United States for the southern district of Florida, that on the 16th of October last the said schooner arrived at Key West from Nassau, N. P. Among the passengers on board were three colored British subjects formerly residents of Nassau, who had, as the attorney was informed,

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sold their property and brought the proceeds with them, intending to make Florida their future home. Upon landing, they, with the captain of the vessel, were arrested and carried before a justice of the peace for a violation of the laws of Florida enacted November 22, 1829 and February 10, 1832. The captain, pursuant to the requirements of those laws, gave bond for the immediate return with him of the colored passengers. All were thereupon released. No further steps were taken by the State authorities.

You invite my attention to the act of Congress of February 28, 1803, (2 Stats., 205,) and ask whether, in my opinion, it, or the statutes of Florida referred to, shall or not be deemed repealed in effect by the 13th article of the amendments of the Constitution of the United States, or by the act of Congress of April 9, 1866, entitled "An act to protect all persons of the United States in their civil rights and furnish means for their vindication."

I construe your question, although propounded in general terms, as having exclusive reference to the actual case of British subjects of African descent coming directly to Florida from a British port with the intent of forming a permanent settlement within the limits of that State. The act of Congress of February 28, 1803, declares, "That from and after the 1st day of April next, no master or captain of any ship or vessel, or any other person, shall import or bring, or cause to be imported or brought, any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States, or seamen natives of counties beyond the Cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any State which by law has prohibited, or shall prohibit, the admission or importation of such negro, mulatto, or other person of color."

The legislation of Florida referred to relates to bringing a free colored person into that State, whether from another State or from a foreign country, and provides stringent penalties for a violation of its provisions.

I am of opinion that there is nothing in the 13th article

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or the act of April 9, 1866, which repeals by implication the act of 1803.

The amendment declares that neither slavery nor involuntary servitude, except as a punishment for crimes, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction. It dissolved the relation of master and servant which existed in the slave-holding States of this Union; but it does not repeal or modify, nor was it designed to repeal or modify, any pre-existing legislation which was a regulation of commerce, and which excluded from our borders persons or classes of persons subjects of foreign power.

The act of April 9, 1866, was chiefly designed to give practical effect to the order of things resulting from the adoption of the amendment. The 1st section declares that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are citizens of the United States; and confers upon such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, the same rights and the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and renders them subject to like punishment, pains, and penalties, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. The remaining sections provide for the more effectual preservation of "the rights secured or protected by the act."

No provision relates to the rights of any person not declared to be a citizen of the United States.

The acts of Florida are in the nature of an internal police regulation. I can perceive nothing in those laws, so far as they are applicable to and have been enforced in the case presented, which is affected by the constitutional amendment or the act of 1866.

Their bearing upon the rights of a citizen of the United States presents a very different question, upon which, as

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it does not arise in this case, it is unnecessary to express any opinion.

I am, sir, very respectfully,
Your obedient servant,
O. H. BROWNING,
Attorney General ad interim.

Hon. WM. H. SEWARD,
Secretary of State.

EMPLOYMENT OF COUNSEL BY DEPARTMENT.

The Secretary of War has the right to employ and pay special counsel to examine the title of lands purchased under the direction of his department.

ATTORNEY GENERAL'S OFFICE,
June 12, 1868.

SIR: The Secretary of War *ad interim* submitted, with his letter of the 3d of December last, a communication from the acting Quartermaster General, of November 30, 1867, relative to the payment of charges made by district attorneys of the United States for services rendered by them in the examination of titles to lands purchased under the direction of the War Department, and requesting advice upon this subject.

The services referred to are of a professional character, requiring legal skill and learning for their due performance, and I have no doubt of the authority of your department to employ these attorneys as counsel with a view to the proper discharge thereof. Such authority in recognized in the 1st section of the act of February 26, 1853, (10 Stats., 161,) and has been exercised by settled usage from the beginning of the Government by the head of any department having occasion for the services of a lawyer.

These services not being among the enumerated duties of those officers, for which compensation is prescribed in detail by the statute regulating their fees, (*Ibid*, 161,) they

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have been regarded as extra official services, to be paid for out of the appropriate funds of the department at the request whereof, or in connection with whose administration, they were rendered. This view accords with the opinions of all Attorneys General who have pronounced on the subject, and with uniform practice. See, for example, opinion of Mr. Attorney General Cushing, of February 18, 1854, (6 Opinions, 301,) cited and approved by Mr. Attorney General Bates, in an opinion dated May 13, 1861, (10 Opinions, 45.)

By reference to an opinion addressed to the Secretary of War, under date of the 8th of March, 1866, by Mr. Attorney General Speed, it will be seen that your department has already received the advice of this office on the precise question in hand.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,[1]

Attorney General ad interim.

Hon. J. M. SCHOFIELD,

Secretary of War.

PAY OF PAYMASTER OF NAVAL STATION OF CALIFORNIA.

The act of June 1, 1860, to regulate the pay of the navy, does not repeal the act of March 3, 1853, providing specially for the pay of a purser doing duty at the naval station of California.

ATTORNEY GENERAL'S OFFICE,

June 15, 1868.

SIR: I have considered the case of Charles Murray, paymaster in the navy, upon a statement of which you endorsed, under date of the 3d inst., a reference to this office for my opinion.

It appears from a letter of the Second Comptroller to the attorney of Paymaster Murray that, from the 11th of April, 1861, to the 29th of June, 1864, that officer acted as paymaster of the naval station of California, and for that

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service was allowed only the pay that he would have been entitled to as a purser or paymaster at any other station. The difference between that sum and $4,000 per annum is now claimed for him, on the ground that the act of March 3, 1853, which made the pay of the purser of that station $4,000, was not repealed by the act of June 1, 1860, which prescibes a different sum as the pay of a purser.

The question is simply whether the two following statutory provisions can be reasonably reconciled with each other and with the laws relating to the navy *in pari materia*.

The general naval appropriation act of March 3, 1853, section 1, provides:

"And the pay of a purser, when attached to and doing duty at the naval station of California, shall be $4,000 per annum." (10 Stats., 220.)

The act entitled, "An act to increase and regulate the pay of the navy of the United States," approved June 1, 1860, provides that, from and after its passage, "the annual pay of the officers of the navy, on the active list, hereinafter named, shall be as follows:"

"*Pursers.*—Every purser on duty at sea, for the first five year after the date of his commission, $2,000," etc. (12 Stats., 25, 26.)

Words similar to those quoted occur in successive clauses, discriminating the rate according to length of service and the kind of duty, *i. e.*, "duty at sea," as above, "on other duty," and "on leave or waiting orders."

The question is, do the words "every purser," together with the sum prescribed, according to his kind and length of service, in this, which is the later act, repeal, by necessary implication, the express clause in the prior act, providing for the special case of service in California? I am of opinion that it does not. I perceive no difficulty in reconciling a provision increasing the pay of pursers generally to a certain sum, with another provision increasing the pay of a purser, under particular circumstances, to a higher sum. All affirmative statutes on the same subject ought to stand together, unless the later one *necessarily* im-

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plies negation. "But," says a standard authority, "a later statute, which is general and affirmative, does not abrogate a former statute, which is particular." (Dwarris on Stat., 532.) Again: "A subsequent act, too, which can be reconciled with a former, shall not be a repeal of it, though there be negative words," says the same authority, citing a statute providing that "all trials for treason shall be according to the course of the common law, and not otherwise," which did not repeal a former statute, providing a different trial for treason beyond seas. (Dwarris on Stat., 533.)

"The repeal of a law by implication and construction of a subsequent law should be so clear, as to leave no reasonable doubt that such was the intention of the legislature. It should be as certain as an express repeal. It should not be deduced by an ingenious course of argument, but should appear at once." (The United States *v.* Cases of Cloth, Crabbe's R., 370.)

Does it so appear in this case? Is there such repugnancy as necessarily to raise an implication of the repeal of the former special law, or to justify such implication? I think not.

If the special provision in the act of 1853 is repealed, it must be by force solely of the words, "every purser," in the law which provides that the annual pay "shall be" a prescribed amount. But the act "to regulate the pay of pursers, and other officers of the navy," passed August 26, 1842, (5 Stats., 535,) fixed the pay of all pursers of the navy under different circumstances and conditions of service.

This remained the general law until the passage of the act of June 1, 1860.

But from the operation of these general rules, thus prescribed, a provision in section 4 of the act of March 5, 1849, (9 Stats., 378) withdrew the officer "attached to and doing duty at the naval station of California," and fixed a different compensation for him from that prescribed in the general law for pursers in the several conditions of service. Next we have the provision in question, making that com-

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pensation $4,000. This excepted the purser on duty at the California naval station from the general rules, yet left those general rules unchanged in their application to *all* pursers when doing duty elsewhere than at the naval station of California. The two laws—the general and special—operated together. There was no conflict or incompatibility between them.

The act of June 1, 1860, was intended to remodel the general law, and, if so, it must have left the special law untouched. That exception still stands, and is no more incompatible with the general rule now than it was before the passage of the law of 1860. Since the passage of the law of June 1, 1860, other naval officers on duty at the naval station of California have been excepted by special enactments from its general provisions, and higher pay granted them than is allowed to officers of the same grade on duty elsewhere.

An important class of provisions in the laws relating to the navy, as in those relating to the army, have respect to the Pacific stations only, which could not be treated as repealed without a very manifest legislative intent. This one, providing $4,000 per annum to the purser, belongs to that class. It is, therefore, a part of the system of laws relating to the navy, in which a particular policy is too clearly discerned, through very numerous statutory provisions at different times, to make it doubtful whether Congress intended to introduce a solitary incongruity by a remote implication.

I am, sir, very respectfully,
Your obedient servant,
O. H. BROWNING,
Attorney General ad interim.

The PRESIDENT.

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CASE OF COLONEL BELGER.

This officer was effectually dismissed from the service by the general order issued from the Adjutant General's Office on November 30, 1863.

ATTORNEY GENERAL'S OFFICE,
June 16, 1868.

SIR: On taking charge of the duties of this office, my attention was directed to the letter of your department, of the 8th of January last, enclosing general order of the War Department, No. 90. At as early a period as other indispensable engagements permitted, I have carefully considered the question you submit, whether James Belger "is now in the service, and may be assigned to duty."

The question arises upon the following facts:

Major Belger was a quartermaster in the United States army, and held the appointment of colonel and additional aid-de-camp, under the act of August 5, 1861. His term of office was during the pleasure of the President for the time being, and such was the tenor of his commission.

Colonel Belger was arraigned and tried before a general court-martial, which convened June 1, 1863, (pursuant to special orders No. 235, dated War Department, Adjutant General's Office, Washington, May 26, 1863,) and June 13, 1863, (pursuant to special orders No. 257, dated War Department, Adjutant General's Office, Washington, June 10, 1863.) The charge preferred was "neglect and violation of duty, to the prejudice of good order and military discipline." The court found Colonel Belger not guilty of the charge and of each of the specifications accompanying it, and honorably acquitted him. In the record of its proceedings appears the following statement:

"The court finds that Colonel Belger transacted a large amount of public business within the time embraced in the specifications in chartering vessels and in the purchase of coal; and although in some instances he appears to have purchased coal at higher rates than the cash market prices, yet, considering the circumstances, especially the kind of

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funds provided by the Government for the payments he was required to make, the urgency of the orders under which he was frequently alled upon to act, and the consequent necessity for immediate action, the court attaches no criminality thereto, and has therefore made its findings in accordance with this judgment."

General order No. 385, dated War Department, Adjutant General's Office, Washington, November 30, 1863, was issued. After reviewing the evidence in the case, and commenting upon the action of the court, it concludes as follows:

"The statement of the court of the facts found, being in conflict with the formal finding on the charges, makes the proceeding a nullity. The evidence fully establishes that Colonel Belger is guilty of gross neglect and violation of duty, to the prejudice of good order and military discipline. The proceedings of the court are therefore disapproved, and Colonel Belger, quartermaster, is, *by order of the President*, dishonorably dismissed from the United States service."

The court was thereupon dissolved. Subsequently, the following order was issued:

"GENERAL COURT-MARTIAL,
Orders No. 90.

"HEADQUARTERS OF THE ARMY,
"ADJUTANT GENERAL'S OFFICE,
"WASHINGTON, *November* 11, 1867.

"By direction of the President, so much of general orders No. 285, War Department, Adjutant General's Office, November 30, 1863, as dismisses Colonel James Belger, quartermaster, United States army, from the service of the United States, is hereby revoked.

"By command of General Grant.

"E. D. TOWNSEND,
Assistant Adjutant General."

It is strenuously insisted, in a paper before me, that the order dismissing Colonel Belger from the service was the act of the Secretary of War, and not of the President.

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In the analogous case of Major Clarke, who was dismissed from the office of paymaster in the army by an order from the office of the Adjutant General, Attorney General Wirt remarks, under date of February 17, 1828:

"Was it necessary that there should have been an order, under the sign-manual of the President, to make the dismissal effectual?

"The law does not require it. The act of the 31st of January, 1823, requires that the defaulting officer shall be promptly reported to the President, '*and dismissed from the public service.*' It does not prescribe the form of the dismission; it does not say whether it shall be by parol or by writing. This is left entirely to the pleasure of the President. I am aware of no law which requires the President's *sign-manual* on such occasions. No law has been referred to, either by Major Clarke or the eminent counsel whose opinions he has furnished, requiring such a *sign-manual.* Their reasoning bears with weight upon the *expediency* of giving such an order under the President's own hand. It might be safer and better to adopt the practice; but you will find, by the report of the Adjutant General accompanying this opinion, that the practice has not heretofore been adopted by your predecessors, but that such orders of dismission, though proceeding from the President, have been signified to the officer dismissed through the office of the Adjutant General, as in this case.

"The dismission must indeed be the formal act of the President; that is to say, no one can dismiss but the President. But the mode in which he shall communicate his pleasure is left wholly to himself. I see nothing in the law to prohibit him from giving a verbal dismission to the party, the law being entirely silent on the subject. It is enough to know that the authority which has been exercised is the authority of the President, and whatever places the fact beyond doubt is sufficient.

"This is not the only case in which authority is given by the laws to the President, and in which he alone can exercise it, and in which, nevertheless, he continually exercises

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it, by verbal instructions to his Secretaries. Yet it has never before been questioned that these acts proceed from the President, though they are not attested by his sign-manual. I learn, on inquiry, that there is not a single instance, from the foundation of the Government, to be found on the books, either of the Executive or War Department, in which the dismission of an officer has been attested by the sign-manual of the President." "Upon the whole, my opinion is that Mr. Clarke's dismission was effectual, notwithstanding the absence of a written order under the sign-manual of the President."

In the case of the United States *vs.* Eliason, (16 Peters, 291,) the Supreme Court held, that "the Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the Executive, and as such be binding upon all within the sphere of his legal and constitutional authority." The opinion in Wilcox *vs.* Jackson (13 Peters, 513) is equally explicit and decisive.

I am of opinion, therefore, that the general order of November, 1863, conclusively establishes that the dismissal of Colonel Belger from the service was the act of the President of the United States.

Having disposed of this preliminary point, I proceed to the consideration of the following questions, which your inquiry suggests:

1. Could the President, by his order, lawfully dismiss Colonel Belger at the time and under the circumstances hereinbefore stated?

2. Does a subsequent revocation of the order work a restoration of the dismissed officer to the service?

The authority of the President to dismiss an officer from the military or naval service has been fully and elaborately considered by several Attorneys General. They have, in every instance where the question arose, asserted that the authority was derived from the Constitution, and that its exercise was sanctioned by the settled construction of that

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instrument and the uniform practice of the executive branch of the Government.

A court of inquiry, ordered for the investigation of the conduct of Robert B. Randolph, an officer in the navy, decided in his favor. His name was thereupon struck from the rolls by the order of President Jackson. He applied for restoration to the service. Attorney General Legaré, after referring to the Constitution and remarking that "in England the royal prerogative may be exercised on all occasions in dismissing officers from the service without putting them to the form of a trial, and officers of rank in the army and navy have been dismissed, even after having been tried by a court-martial and acquitted of the charges exhibited against them," concludes his opinion of February 11, 1842, (4 Opinions, 1,) by saying, "I have no doubt that the President had the constitutional power to do what he did, and that the officer in question is not in the service of the United States."

In the case of Surgeon Du Barry, who was dismissed from the navy in 1829, Attorney General Clifford, (4 Opinions, 608, *et seq.*,) after a thorough examination of the subject, affirmed the power of the President to dismiss military or naval officers from the service. In his opinion, no distinction in that regard existed between them and civil officers. They alike hold their places subject to the discretion of the Executive, where a special tenure was not prescribed.

So, in the case of Lansing, Attorney General Cushing, (6 Opinions, 4,) in commenting upon the constitutional power of the President to deprive military officers of their commissions at discretion, remarks: "I am not aware of any ground of distinction in this respect, so far as regards the strict question of law, between officers of the army and any other officers of the Government. As a general rule, with exception of judicial officers only, they all hold their commissions by the same tenure in this respect. Reasons of a special nature may be deemed to exist why the rule should not be applied to military in the same way it

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is to civil officers, but the legal applicability to both classes of officers is, it is conceived, the settled construction of the Constitution.

"It is no answer to this doctrine to say, that officers of the army are subject to be deprived of their commissions by the decision of a court-martial.

"So are civil officers by impeachment. The difference between the two cases is in the form and mode of trial, not in the principle, which leaves unimpaired, in both cases alike, the whole constitutional power of the President."

In a subsequent opinion of the same Attorney General, (8 Opinions, 230,) the constitutional power of the President to dismiss officers of the navy and army is discussed, and its existence declared to be well established.

He cites, in support of this view, in addition to the opinions already noticed, numerous other authorities.

At the date of Colonel Belger's dismissal, there was not only no attempt by Congress to impose any restriction upon the President's discretionary power of removal, but the existence of the power was, to the fullest extent, distinctly recognized. In the last clause of the 11th Article of War are the words, "nor shall a commissioned officer be discharged the service but by order of the President of the United States, or by sentence of a court-martial."

By the 17th section of the act of July 17, 1862, (12 Stats., 596,) the President of the United States was "authorized and requested to dismiss and discharge from the military service, either in the army, navy, marine corps, or volunteer force in the United States service, any officer, for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service."

This provision did not, in my opinion, clothe the President with a new power, but gave an express legislative sanction to the exercise of a power incident to the high official trust confided to him.

He was requested to deprive any officer of his commis-

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sion whenever the interests of the service would, in his judgment, be thereby promoted. Those who deny that the power of removal is incident to the qualified power of appointment, with which the President is invested by the Constitution, must certainly concede that the terms "authorized and requested," found in the act of 1862, confer upon him an unlimited discretionary authority in the premises.

At the period in question, therefore, the President had the power, whether derived from the Constitution or conferred by legislative grant, to dismiss an officer from the military service of the United States.

It is urged on behalf of Colonel Belger, that the acquittal by the court operated to deprive the President of the power to remove him on the charge whereof he was acquitted, as a removal, under the circumstances, would amount to a new trial and conviction on the same charge.

As the proceedings were not remitted for reconsideration by the court, and as the court itself was dissolved, it is undoubtedly true that Colonel Belger must be regarded as fully acquitted of the charge; but the action of the court could not impair or limit the authority of the President to dismiss Colonel Belger from the service.

The relations of Colonel Belger to the service having been dissolved, a revocation of the order dismissing him cannot work his restoration.

Attorney General Nelson (4 Opinions 274,) justly observes: "No case has been brought to my notice in which an officer once dismissed has been restored to the service otherwise than by nomination by the Chief Magistrate and confirmation by the Senate, where the grade of appointment was within the control of their joint action; and, if such a case has occurred, I should not hesitate to declare it to be in direct repugnance to the Constitution and the laws, and to every principle applicable to their just and safe construction." In a subsequent opinion (*Ibid.*, 306) he states, "I know of no power by which an officer, once

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out of service, can be brought back to it, other than that of appointment."

Upon the whole question, I am therefore of opinion that Colonel James Belger is not now in the service, and may not be assigned to duty.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

Hon. J. M. SCHOFIELD,

Secretary of War.

A CONSTITUTIONAL CONVENTION NOT THE LEGISLATURE OF A STATE.

A cession of jurisdiction over land purchased by the United States by a constitutional convention of a State is not a consent to the purchase by the legislature of the State within the sense of the Constitution and the joint resolution of September 11, 1841

ATTORNEY GENERAL'S OFFICE,

June 15, 1868.

SIR: The joint resolution of Congress of September 11, 1841, (5 Stats., 468,) provides:

"That no public money shall be expended on any site or land hereafter to be purchased by the United States for the purposes aforesaid until the written opinion of the Attorney General shall be had in favor of the validity of the title, and also the consent of the legislature of the State in which the land or site may be shall be given to said purchase."

The "purposes aforesaid," as specified in the 1st section, do not distinctly embrace national cemeteries. Nevertheless, I do not propose at present to inquire whether the passage quoted is applicable to them, but will assume that it is, for the purposes of the case now in hand.

The Constitution of the United States (art. I, sec. 8, clause 17) provides that Congress shall have the power

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"to exercise exclusive legislation in all cases whatsoever over * * * all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

It appears that under date of August 3, 1867, the acting Attorney General expressed his opinion that the title which the United States would acquire by a conveyance which was proposed by the owners of a tract of land near Corinth, Mississippi, now occupied for a national cemetery, would be good and valid.

But in order to consummate the transfer, the consent of the State, as contemplated in the resolution of 1841, is requisite.

Under the circumstances, you transmit with your letter of the 1st inst. "An ordinance passed by the constitutional convention of the State of Mississippi, April 25, 1868, to cede to the United States the jurisdiction over the national cemetery in the county of Tishemingo, in this State, and to protect the same," and request my opinion as to the validity of said act of cession.

If this ordinance is valid for the purpose, it can only be so as a competent expression of the consent of the legislature of the State of Mississippi, in the sense of those words in the resolution of 1841 and the Constitution of the United States.

I have no hesitation in expressing the opinion, that a body of the character known in this country as a constitutional convention of a State is not "the legislature of the State" in the sense of the Constitution and statutes of the United States, and consequently that the ordinance referred to is not a valid consent to the purchase.

I am, sir, very respectfully,

Your obedient servant,

O. H. BROWNING,

Attorney General ad interim.

Hon. J. M. SCHOFIELD,

Secretary of War.

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REFUNDING OF DUTIES.

The words "*under bond*," in the 8th section of the act of March 28, 1854, have exclusive reference to, and are descriptive of, the goods, wares, and merchandise, and not the *warehouse*.

ATTORNEY GENERAL'S OFFICE,
June 25, 1868.

SIR: I have received your communication and accompanying papers in relation to certain claims for return of duties paid prior to the passage of the act of March 3, 1865, (13 Stats., 495,) on goods which, having been in warehouse less than three years, were destroyed by fire on the 16th of April, 1865, in bonded warehouse Nos. 278 and 280, South street, New York.

It is insisted by the owners of the goods that these claims are within the 8th section of the act of March 28, 1854, (10 Stats., 275,) and you inform me that the "construction of the words 'under bond,' where they first occur in that section, seems to be the point in controversy."

In order to arrive at a just conclusion upon the point submitted, I have carefully examined and considered the remaining sections of that act, and also the preceding as well as the subsequent legislation bearing upon the subject.

I am clearly of opinion, that the term "under bond," in the connection where it occurs in the section which you cite, has exclusive reference to, and is descriptive of, the merchandize, and that there is nothing in the act of 1854, or in any other act, which authorizes the Secretary of the Treasury to refund the duties in question.

I am, sir, very respectfully,
Your obedient servant,
O. H. BROWNING,
Attorney General ad interim.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

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CASE OF THE STEAMER TAPPAHANNOCK.

The accounting officers have no power to set-off against an account upon a contract a claim in favor of the United States for unliquidated damages for a tort of the party whose account is presented for adjustment.

ATTORNEY GENERAL'S OFFICE,
July 2, 1868.

SIR: I have received your letter of the 27th of April last, transmitting sundry papers in relation to the account of the owners of the steamer "Tappahannock," and requesting, at the instance of the Second Comptroller of the Treasury, my opinion upon the questions of law involved.

The papers are voluminous. My duty does not require me to elicit and collate the facts from conflicting documentary or other proofs, but simply to give an opinion on questions of law arising on a statement of facts which you may be pleased to submit. I have, however, waived, in the present instance, such a statement.

The steamer was chartered by the Government at a stipulated sum per day, and the owners covenanted to man and furnish her in every respect fit for service at their own costs and charges. Their account was disallowed by the Quartermaster General, who held that the United States had a just and valid claim against them for a like sum.

A military board had rendered a finding to the effect, that the steamer was in fault in colliding with and sinking the schooner "Ashland," which was laden with public stores. The damages sustained by the Government amounted to the sum due under the charter-party.

The Third Auditor passed the account, and, after an examination of the original proofs, and those subsequently produced, reported that the steamer was not at fault.

The Second Comptroller, to whom the Auditor transmitted the account, with the vouchers, for ultimate decision, reviewed the proofs, and disallowed the account upon the ground assumed by the Quartermaster General.

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The Comptroller and Auditor agree on the amount earned under the charter-party, but differ as to the liability of the owners of the steamer.

I have examined the proofs, but shall express no opinion, except upon the question of law which arises in the present status of the case.

The authority of the accounting officers of the Treasury is confined to the adjustment of "accounts." It does not, therefore, extend to claims against the Government for unliquidated damages, (8 Opinions, 293, and the cases there cited,) nor, as in the present case, to claims in its favor for damages occasioned by the alleged tort of a party whose account upon a contract is presented for adjustment. Such damages cannot be lawfully set-off by those officers against such an account.

In adjusting claims against the Government, every just and allowable item of set-off should be admitted.

I beg leave to refer to two cases adjudicated by the Supreme Court, in which the doctrine of set-off is distinctly announced.

In The United States *vs.* Robeson, (9 Peters, 323,) they thus held: "A claim for unliquidated damages cannot be pleaded by way of a set-off in an action between individuals, and the same rule governs in an action brought by the Government."

In The United States *vs.* Buchanan, (8 Howard, 101,) the court, in commenting upon the statute of March 3, 1797, which allows set-offs, remarks: "The object is to settle between the parties their mutual accounts or debts. But any wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off. This rule prevails where the United States are plaintiffs, as well as individuals."

The same rule governs where the United States is the indebted party. If they waived their sovereignty as a bar to a suit brought upon the charter-party, the court would regard as insufficient a plea setting up, by way of set-off, a claim for unliquidated damages occasioned by a tort.

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Case of Captain Walker.

The collision mentioned in the papers presents a case peculiarly proper for judicial cognizance. A judgment of recovery in favor of the Government and against the owners of the steamer would, like any other debt of record, constitute a valid set-off to their account.

I am, sir, very respectfully,
Your obedient servant,
O. H. BROWNING,
Attorney General ad interim.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

CASE OF CAPTAIN WALKER.

The Attorney General will not give an opinion on a question of law determined by a department in a case no longer before it.

ATTORNEY GENERAL'S OFFICE,
July 20, 1868.

SIR: I have the honor to acknowledge the receipt of your letter of the 22d of October last, wherein, at the request of certain trustees of Norwich University, Northfield, Vermont, and in accordance with the recommendation of the Judge Advocate General of the army, you request my opinion as to the proper construction of so much of the 26th section of the act approved July 28, 1866, to increase and fix the military establishment of the United States, as forms the subject of a certain appeal from the decision of the War Department upon the same.

The paper to which you refer as an appeal is a letter of the trustees, addressed to the Attorney General of the United States, commenting upon a decision of the Secretary of War in the case of Brevet Major Thomas Walker, captain of the United States army, retired. That officer, by special order, No. 76, was, by direction of the President of the United States, authorized to accept the position of president of the Norwich University, and by the decision

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it was determined that a retired officer, when permitted to accept such a position, may be detailed for that purpose, but is not on duty in such sense as to entitle him to full pay and emoluments. From that decision these trustees appeal to the Attorney General.

The case has been disposed of, and is no longer depending in your department. It has been uniformly held, that an appeal will not lie from the decision of any officer of the Government to the Attorney General, (6 Opinions, 290;) and that the Attorney General will not give an opinion upon an important legal question, when it is not practically presented by an existing case before a department. (9 Opinions, 421.)

I must therefore decline expressing an opinion touching the decision of your department upon a case no longer before it.

I am, sir, very respectfully,
Your obedient servant,
O. H. BROWNING,
Attorney General ad interim.

Hon. J. M. SCHOFIELD,
Secretary of War.

EXTRADITION OF FRAUDULENT BANKRUPTS.

The additional article proposed to the extradition treaty between the United States and France will be effectual for the mutual surrender of fraudulent bankrupts.

ATTORNEY GENERAL'S OFFICE,
July 18, 1868.

SIR: Circumstances beyond my control have unavoidably postponed until this date a reply to your letter enclosing a copy of your correspondence with Mr. Berthemy, the French minister, in relation to an additional article to the extradition treaty between the United States and France, providing for the mutual surrender of fraudulent bankrupts.

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In reply to your inquirry, I have the honor to state, that the draft of the article which you transmit, should it go into effect, would, in my opinion be sufficient for the purpose.

I am, sir, very respectfully,
Your obedient servant,
O. H. BROWNING,
Attorney General ad interim.

Hon. WM. H. SEWARD,
Secretary of State.

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OPINIONS

OF

HON. WILLIAM M. EVARTS, OF NEW YORK,

APPOINTED JULY 20, 1868.

BOUNTIES TO INDIAN REGIMENTS.

The opinion of the Attorney General of September 21, 1867, in favor of the right of the Indian regiments to the bounty provided by the act of July 28, 1866, affirmed.

ATTORNEY GENERAL'S OFFICE,
July 24, 1868.

SIR: A copy of the letter of the 7th of October last, from General Grant, then acting Secretary of War, to the Attorney General, relative to bounty money claimed by Indian soldiers, has been laid before me, with accompanying papers; having been furnished this office with your letter of the 16th inst.

It appears that under date of the 21st of September last, Mr. Attorney General Stanbery gave an opinion, at the request of the Secretary of War, upon the question whether the Indian regiments serving in the late war were entitled, in common with other soldiers, to the bounty money provided by the act of July 28, 1866, (14 Stats., 322.) Mr. Stanbery's opinion was in the affirmative. Subsequently, a communication was addressed to the Secretary of War by the Paymaster General, in which the latter officer submitted considerations that appeared to him to justify a review of the question; and the letter of General Grant, above referred to, in the following terms, was doubtless intended to introduce the remarks of the Paymaster General, and also of the Adjutant General, to the attention of

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Mr. Stanbery, with a view to his reconsideration of the question. General Grant says, "For reasons stated to you verbally, I have the honor to send herewith reports by the Adjutant General and Paymaster General respecting the bounty to Indian regiments, about which you furnished an opinion on the 21st of September."

I have the honor to state, that I have carefully read the opinion of the late Attorney General and also the reports of the Adjutant General and the Paymaster General, and have found nothing in the latter which in my judgment of law should modify the former.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. J. M. SCHOFIELD,
Secretary of War.

NOCK'S CASE.

No injunction exists which can restrain this claimant from receiving the full amount of the judgment of the Court Claims.

ATTORNEY GENERAL'S OFFICE,
August 7, 1868.

SIR: After a careful consideration of the subject presented in your letter of the 2d instant, relative to the case of Joseph Nock, I am of opinion that, upon the facts therein stated, and in view of the proceedings had at the general term of the supreme court of the District of Columbia, to which reference is made, no injunction or other proceeding now exists restraining the said Nock from receiving the full amount of the judgment recovered by him in the Court of Claims. The papers which accompanied your letter are herewith returned.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

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ROLLINGS' CASE.

1. The act of July 4, 1864, (13 Stats., 381,) so far as it relates to the jurisdiction of the Court of Claims, is a restraining statute; but, in so for as it relates to the adjustment of the claims for quartermasters' and commissary stores therein mentioned, it is an enabling law.
2. This act does not comprehend accounts founded upon express contracts for the purchase of supplies for the army, made by the proper agents of the Government, within the scope of the army appropriation acts.
3. A claim arising upon such a contract cannot properly be said to originate in an insurrectionary State, although the contract may have been performed in such a State.
4. The declaratory act of February 21, 1867, (14 Stats., 397,) so far as it relates to the settlement of claims for supplies furnished to the army, embraces only the class of claims covered by the act of 1864, and does not extend to accounts based upon contracts made by the duly-authorized agents of the Government.

ATTORNEY GENERAL'S OFFICE,
August 7, 1868.

SIR: In your communication of the 22d ultimo, you present the following case for my consideration:

On the 4th of April, 1866, the Third Auditor of the Treasury, having examined an account of John A. Rollings against the United States, found and certified a balance in claimant's favor, amounting to $5,600, "for fourteen hundred cords of wood, furnished and delivered to the Quartermaster's department, on the line of the Loudon and Hampshire railroad, in the neighborhood of Vienna, Virginia, during the spring of 1863, in pursuance of a written contract made with Captain C. B. Ferguson, assistant quartermaster, January 13, 1863, and a verbal contract subsequently made, at the rate of $4 per cord," and transmitted the account, vouchers, and certificate to the Second Comptroller for his decision thereon. This balance was admitted and certified by the Comptroller on the next day.

Thereupon the settlement was sent from the Treasury Department to the War Department for a requisition in favor of the claimant for the amount found due; and on its being afterwards referred to the Quartermaster General,

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that officer, having previously disapproved the account, and still adhering to his former objections, declined to call for a requisition, unless ordered so to do by the Secretary of War. No order was made by the Secretary of War, and no requisition was issued.

A recent act, approved March 30, 1868, declares, "That the act of March 3, 1817, entitled 'An act to provide for the prompt settlement of public accounts,' shall not be construed to authorize the heads of departments to change or modify the balances that may be certified to them by the Commissioner of Customs or the Comptroller of the Treasury; but such balances, when stated by the Auditor, and properly certified by the Comptroller, as provided by that act, shall be taken and considered as final and conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts: *Provided*, That the head of the proper department, before signing a warrant for any balance certified to him by a Comptroller, may submit to such Comptroller any facts in his judgment affecting the correctness of such balance; but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided."

Under the proviso of the above act, the settlement in Rollings' case was referred by the War Department back to the Second Comptroller, together with the objections theretofore urged by the Quartermaster General against the allowance of the account. But the Comptroller subsequently returned the settlement to that department, and stated that he had previously considered the objections suggested, and found no reason to modify or change it.

Since the date of the settlement, however, a law has been passed enacting as follows: "That the provisions of chapter two hundred and forty, of the acts of the Thirty-Eighth Congress, first session, approved July 4, 1864, shall not be construed to authorize the settlement of any claim for supplies or stores taken or furnished for the use of or used by the armies of the United States, nor for the occupation of or injury to real estate nor for the consumption, appropria-

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tion, or destruction of, or damage to, personal property, by the military authorities or troops of the United States, where such claim originated during the war for the suppression of the southern rebellion in a State or part of a State declared in insurrection by the proclamation of the President of the United States, dated July 1, 1862, or in a State which, by an ordinance of secession, attempted to withdraw from the United States Government: *Provided*, That nothing herein contained shall repeal or modify the effect of any act or joint resolution extending the provisions of the said act of July 4, 1864, to the loyal citizens of the State of Tennessee, or of the State of West Virginia, or any county therein." (14 Stats., 397.)

In connection with the foregoing state of facts, you observe: "The question arises in my mind as to the effect of this prohibitory law upon the action of the Secretary of War. Is that officer constrained to issue a requisition in view of the final decision of the Second Comptroller, notwithstanding the prohibitory enactment."

The inquiry, therefore is, whether or not the Secretary of War may lawfully decline to issue a requisition in the premises? The solution of this question would appear to depend upon the effect of the act of July 4, 1864, and the subsequent declaratory law of February 21, 1867, considered with reference to the character of the claim, or subject-matter of the settlement by the accounting officers, on which a requisition has been called for.

The act of 1864 (13 Stats., 381) is, as regards the jurisdiction of the Court of Claims, a restraining statute; but in so far as it relates to the authority of the officers of the Executive Departments therein named, over the class of claims falling within the 2d and 3d sections thereof, it is properly an enabling statute. This is indicated by its title, which describes it as "An act to restrict the jurisdiction of the Court of Claims, and to provide for the payment of certain demands for quartermasters' stores and subsistence supplies furnished to the army of the United States." The 2d section enacts, "That all claims of loyal citizens in

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States not in rebellion, for quartermasters' stores actually furnished to the army of the United States, and receipted for by the proper officer receiving the same, or which may have been taken by such officers without giving such receipt, may be submitted to the Quartermaster General of the United States, accompanied with such proofs as each claimant can present of the facts in his case; and it shall be the duty of the Quartermaster General to cause such claim to be examined, and, if convinced that it is just, and of the loyalty of the claimant, and that the stores have been actually received or taken for the use of and used by said army, then to report each case to the Third Auditor of the Treasury, with a recommendation for settlement." The 3d section makes a like provision for similar claims for subsistence stores.

It was manifestly the design of this statute to provide for the settlement of a class of claims which the military emergencies and exigencies, during the late rebellion, gave rise to, and which, before its passage, there was understood to be no authority in any of the officers of the executive branch of the Government to adjust. This embraced demands growing out of the seizure of property for the use of the army, or originating in irregularities in the service, which, from the manner of their creation, it was supposed could not be taken cognizance of by those officers under the laws and regulations then existing.

But this act obviously does not comprehend accounts founded upon express contracts for the purchase of supplies for the army made by the proper Government agents within the scope of the army appropriation acts. No legislation was necessary at the time to provide for the settlement of claims of this character, nor could any doubt have been entertained by Congress of the authority of the proper officers of the Government to adjust and pay them. A claim arising upon such a contract cannot properly be said to originate in a State in insurrection, although the contract may have been performed in one of the rebel States.

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To my mind, then, it seems clear, that the claim of Rollings, founded upon an account for fuel delivered by him to the Quartermaster's department, under express contracts, the validity of which is not impugned, entered into with the proper officer of that department, and for the purchase whereof provision was made by an appropriation for the regular supplies of the army, does not belong to the class of cases to which the act of 1864 was intended to apply. The declaratory act of 1867, cited above, so far as it relates to "the settlement of any claim for supplies or stores taken or furnished for the use of or used by the armies of the United States," must be regarded, I think, as embracing only the class of claims covered by the act of 1864. It does not extend to accounts based upon contracts made by the duly authorized agents of the United States, the performance of which, on the part of the Government, considerations of policy and good faith alike seem to require.

Upon this view of the case, presented in your communication and accompanying documents, I perceive no ground to justify the withholding of a requisition for the payment of the balance found due on the settlement mentioned.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. J. M. SCHOFIELD,
Secretary of War.

CASE OF E. A. ROLLINS, COMMISSIONER OF INTERNAL REVENUE.

1. The "tenure-of-civil-office act" impresses upon a class of civil officers a tenure at the will of the office holder, which cannot be terminated except by the concurrence of the President and the Senate in the appointment of a successor, and his actual induction into the office.
2. The purpose of that act was to change the doctrine and practice of the Government, by which removal from office was effected at the mere discretion of the President.
3. The only interruption of the personal right of the officer against his will, possible under the act, is the general power of impeachment and judgment thereon, or the special proceedings of suspension, accusation, and

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judgment thereon, provided by the act, which partake of the nature of impeachment.

4. Where an officer, within the "tenure-of-civil-office act," tenders in writing to the President the resignation of his office, "to take effect upon the qualification of my (his) successor, nominated by yourself (the President) and confirmed by the Senate," his tenure of the office can be regarded as relinquished only upon and after the event which is named in his communication.

5. Such a communication has no official or legal force whatever, in placing at the discretion or disposition of the President any power over the office which he did not possess without it.

6. An endorsement upon such a communication by the President, declaring his acceptance of "the resignation," has no operation upon the position of the office, as respects its vacancy, or the President's present authority to fill it.

ATTORNEY GENERAL'S OFFICE,
August 10, 1868.

SIR: I have given to the subject submitted to my consideration, by your letter of the 7th instant, in relation to the present position of the office of Commissioner of Internal Revenue, the most careful attention.

The case presents itself as follows: Mr. E. A. Rollins, holding the civil office of Commissioner of Internal Revenue, to which he had been appointed by the President of the United States, by and with the advice and consent of the Senate, addressed to the President, under date of June 8, 1868, the following letter:

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"WASHINGTON, *June* 8, 1868.

"SIR: In pursuance of a purpose known to my friends for several months, I hereby tender you the resignation of my office, to take effect upon the qualification of my successor, nominated by yourself and confirmed by the Senate.

"I am, sir, very respectfully,
"E. A. ROLLINS,
"*Commissioner of Internal Revenue.*"

Upon the 5th August instant the President placed upon this letter the following endorsement:

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Case of E. A. Rollins, Commissioner.

"The resignation of E. A. Rollins, as Commissioner of Internal Revenue, dated June 8, 1868, is this day accepted.

"ANDREW JOHNSON.

"EXECUTIVE MANSION, *August* 5, 1868."

Upon these facts you desire my answer to two questions, viz:

"First. Is the office of Commissioner of Internal Revenue vacant?

Second. If the office is vacant, when did the vacancy occur; and can a successor to Mr. Rollins be appointed during the recess of the Senate?"

The office of Commissioner of Internal Revenue is, as you suggest, a very important and responsible one. Its intelligent, efficient, and faithful administration is a matter of the greatest interest to the public revenues and the public credit, and it is justly a subject of solicitude with the President, that his full duty, under the Constitution and the laws, in respect to this office and its administration, shall be fulfilled.

The questions which you address to me come to be of practical and substantial interest in the executive administration of the Government only by force of the recent legislation of Congress, known as the "tenure-of-civil-office bill," that has impressed upon a class of offices, which includes that now under consideration, a tenure at the will of the office-holder, which cannot be terminated except by the concurrence of the President and the Senate in the appointment of a successor, and his actual induction into the office. So long as the President, by force of the Constitution and the laws, had the power to terminate the office-holder's possession of his office by a removal, at the President's discretion, and against the will of the officer, the terms of the latter's desired adherence to, or resignation of, his office, could have no special significance, for they could impose no restraint upon the time or manner of the President's exertion of his proper authority in the

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premises. The precise effect, therefore, of the legislation referred to is the first point for consideration.

The purpose of the "tenure-of-civil-office act" was to change the doctrine and practice of the Government, by which removal from office, at the mere discretion of the President, had been established as a proper, and, as had been thought, a necessary, attendant of the executive duty and responsibility, under the Constitution, to maintain the efficiency and fidelity of the public service in fulfilling the manifold and incessant obligations of administration and in execution of the laws. This purpose, which might have been limited to a requirement of the concurrence of the Senate with the Executive in effecting a removal from office, and yet left the capacity of removal, as a separate and independent act, open to the exigencies of the public service, has been carried by the law to the extent of precluding a termination of the officer's hold upon his office by the united will of the Executive and of the Senate, except by the sole and specific mode of the appointment, confirmation, and qualification of a successor. This firm hold upon an office into which he shall once have been inducted is put distinctly by the act as a matter of the officer's right and title. The consequence of this is, that there is no other possible mode of vacating the office, thus protected, against the will of the officer, during the session of the Senate, however flagitious and injurious his personal or official conduct may be, except through the constitutional process of impeachment. During the recess of the Senate, the remedial proceeding of temporary suspension for cause by the Executive, followed by accusation to the Senate, its judgment thereon, is provided and may result in the removal of the officer without the necessity of the simultaneous appointment, confirmation, and qualification of his successor.

The language of the section, securing this right and title to the office-holder, is too clear to admit of doubt:

"That every person holding any civil office, to which he has been appointed by and with the advice and consent of

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the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided."

Mr. Rollins, then, at the date of his letter to the President, was *entitled* to hold the office of Commissioner of Internal Revenue until a successor should have been appointed, by and with the advice and consent of the Senate, and should have qualified. And the only interruption of this his personal right, possible under this law, was the general process of impeachment and judgment thereon, or the special proceedings of suspension, accusation, and judgment thereon, provided by the act itself, and which obviously partake of the nature of impeachment.

It rested, then, under this operation of the law, solely with Mr. Rollins to determine whether he would voluntarily put an end to his hold upon the office by a relinquishment or resignation of it, and the question whether the office is now vacant must, in my opinion, turn entirely upon a just construction of the effect of the letter of Mr. Rollins in this regard.

This letter is, manifestly, framed with the intent of carrying an impression that the writer does place himself in respect to his office and to the public service, and to the power and duty of the President in connection therewith, upon a different footing from that in which the law, against or without reference to his wishes, leaves him. But upon duly weighing all parts of this official communication to the President, which respect to the Commissioner would require me, if possible, to give some official efficacy to, I cannot hesitate to pronounce it entirely without any legal operation whatever upon Mr. Rollins' tenure of his office. I am obliged to regard it as a present *tender* of a resignation, which is to become a resignation in actual relinquishment of the office, only upon and after the event which is named and described by the writer as a condition precedent to its having that effect. This event, in the language of

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Mr. Rollins' address to the President, is "the qualification of my successor, nominated by yourself and confirmed by the Senate."

It will be perceived that this event, which is to ripen this "tender of a resignation" into a relinquishment of the office, is precisely the action of the Executive and of the Senate and of the successor of Mr. Rollins which, by the terms of the "tenure-of-civil-office act," deprives him of his office, and consequently of any power or will in regard to its relinquishment. I cannot, therefore, give to this letter of Mr. Rollins any official or legal force whatever, in placing at the discretion or disposition of the President any power over the office of Commissioner of Internal Revenue which he did not possess without it. It remains only for me to consider whether the endorsement upon the letter of Mr. Rollins, made by the President, on the 5th August instant, operates upon the position of the office of Commissioner of Internal Revenue as respects its vacancy, or his present authority to fill it.

Undoubtedly, if an officer of the Government places in the hands of the President a conditional resignation, which takes effect as an official or legal relinquishment of his office upon such condition, it is competent for the President to assent to the condition or not as may seem to him discreet, and in such a case an endorsement of this description would indicate his acquiescence in the disposition of the office which had been made by the conditional resignation.

I have, however, in the nugatory character which I have assigned to the letter of Mr. Rollins, sufficiently shown that, in my opinion, it possessed no legal or official operation whatever upon the office or the President's authority over it, to which the endorsement could attach itself, and I must consider that the office of Commissioner of Internal Revenue and Mr. Rollins' hold upon it remain the same as if his letter had not been written or the President's endorsement made thereon, and that the office is not vacant.

This conclusion renders it unnecessary to consider or reply to your second question, which arises only in case I

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should have found reason to pronounce the office in question vacant.

I have disposed of the matter submitted to me wholly within the premises of the existing legislation governing the question, and without any discussion of the larger topics touching the conformity or repugnance of this legislation with the Constitution, for no such discussion would be appropriate to the inquiries to which you have called my attention.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

CASE OF THE COLLECTORSHIP OF NEW ORLEANS.

1. Where a person holding the office of collector of customs resigned during a session of the Senate, and was sworn in and took his seat as a member of the Senate of the United States, it was *held*, that the office of collector became vacant, although his resignation had not been previously accepted.
2. The predicament of vacancy, which may be filled by a temporary appointment by the President, under the Constitution, is not confined by it to vacancies originating or beginning to exist during the recess of the Senate, but embraces "all vacancies that, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them."
3. It is to be presumed that Congress, in enacting the 3d section of the "tenure-of-civil-office act," accepted the words of the Constitution therein employed in the same sense in which they had been accepted and acted upon by the executive branch of the Government.
4. The predicament of "abeyance," in its application to an office made vacant by resignation during a session of the Senate, and not filled at the expiration of that session by a full appointment, by and with the advice and consent of the Senate, can only arise by the expiration of the *next* session of the Senate, without that body's having concurred in a full appointment to the office.

ATTORNEY GENERAL'S OFFICE,
August 17, 1868.

SIR: I have carefully considered the facts in relation to the collectorship of New Orleans, and the questions which you submit for my determination as arising thereon.

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The case is this: On the 17th of July 1868, Mr. W. P. Kellogg, collector of customs at New Orleans, tendered his resignation of that office, and subsequently, on the same day, was sworn in and took his seat as Senator of the United States from Louisiana. No action was then taken upon his resignation by the executive department. But before the adjournment of Congress, which occurred on the 27th of July, the President sent to the Senate the nomination of a successor to Mr. Kellogg as collector. No confirmation of a successor was had by the Senate. Whether the nomination was rejected or laid over by the Senate does not appear. The office is now exercised by a deputy, previously appointed by Mr. Kellogg, under the 22d section of the act of March 2, 1799. (1 Stats., 644.)

On this state of facts you submit for my opinion the following questions:

1. Whether the deputy may lawfully discharge the duties of the office of collector until a successor to Mr. Kellogg is lawfully appointed, and whether, in such a case, the latter and his sureties are responsible for the conduct of the former?

2. Whether the President, under the circumstances, has power to appoint a collector temporarily?

3. Whether the President or the Secretary of the Treasury, under the 6th section of the act of May 8, 1792, (1 Stats., 280,) may lawfully authorize any person to exercise the functions of a collector, and require from him security for the faithful discharge of the duties thereof, until the office shall be regularly filled?

I will consider the second question first. The answer I will give to it may render unnecessary any opinion on the first and third questions.

A preliminary inquiry is, whether the office of collector of the port of New Orleans is now vacant, and, if it is, by what reason it became vacant?

I have no doubt that the office of collector at New Orleans became vacant by the resignation of Mr. Kellogg, and by his complete institution as a member of the Senate;

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and it is not important to inquire, in the present case, which of these was the efficient means of his withdrawal from the office. Either, in my judgment, was adequate to the effect, and the effect of either, under the actual circumstances of the case, was accomplished during the session of the Senate. So, too, if there had been no express resignation of his office, Mr. Kellogg's acceptance of the place in the Senate, and his induction into it, in view of the provision of the Constitution that "no person holding any office under the United States shall be a member of either House during his continuance in office," must be considered as having the legal character of a resignation of the office of collector.

The case is one, therefore, of an office which became vacant during the late session of the Senate by reason of resignation. May the President now fill the vacancy by granting a commission which shall expire at the end of the next session of the Senate?

The question thus presented, so far as it arises under the special and limited constitutional authority of the President to act upon vacancies in office, without the advice and consent of the Senate, is a familiar one, and though not unfrequently the subject of consideration, in one form and another, by my learned predecessors in the office of Attorney General, the result of their deliberations has been uniform, and has furnished the guide upon which the practice of the Executive has been equally uniform.

The Constitution says: "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions that shall expire at the end of their next session."

The only doubt ever suggested upon the construction of this clause of the Constitution has relation to the true interpretation of the phrase, "that may happen during the recess of the Senate." The subject was fully discussed by Mr. Wirt, in the year 1823, and no view or argument that could shed light upon a correct decision was omitted from

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his consideration of it. He arrived at the conclusion, that the predicament of vacancy in office, which might be filled by the President under this clause of the Constitution, was not confined by it to vacancies originating or beginning to exist during the recess of the Senate, but embraces "all vacancies that, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them." It is upon this interpretation alone that, in Mr. Wirt's judgment, "the whole purpose of the Constitution is completely accomplished." (1 Opinions, 633.)

The considerations which support and enforce this, as the necessary and proper construction of the Constitution, are so fully stated in Mr. Wirt's opinion, and in the opinions of his successors, Attorneys General Taney, Legaré, and Mason, and in the more recent review of the whole subject presented in Mr. Stanbery's opinion of August 30, 1866, addressed to the Postmaster General, that I deem it unnecessary to do more than refer you to those learned constitutional disquisitions. Upon such an established constitutional doctrine, it is hardly useful to express an opinion as upon an original question. I have, however, upon motives of renewed interest in the whole subject of executive authority in appointments to office, excited by recent legislation of Congress, attempted to weigh anew the opposing interpretations of this clause of the Constitution, and the arguments affecting a just conclusion upon the question, and cannot but give my concurrence to the views of my learned predecessors to whom I have referred.

I proceed now to examine the recent legislation of Congress, known as the tenure-of-civil-office act, as bearing upon this subject. The only portion of that act which is applied to the regulation of executive authority, in the filling of admitted vacancies in office, is the 3d section, which reads as follows:

"That the President shall have power to fill all vacancies which may happen during the recess of the Senate, by rea-

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son of death or resignation, by granting commissions which shall expire at the end of their next session thereafter. And if no appointment, by and with the advice and consent of the Senate, shall be made to such office so vacant, or temporarily filled as aforesaid, during such next session of the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office."

The first clause of this section of the act repeats the language of the clause of the Constitution which I have cited, and does not attempt any legislative interpretation of the phrase, "which may happen during the recess of the Senate," which it adopts from the Constitution. Upon the text of the act, therefore, it is impossible to argue that the repetition of the words of the Constitution puts, or purports to put, any interpretation upon them. They are simply adopted by the act in their true constitutional sense, whatever that sense may be. But when we consider the general knowledge which all persons having a responsible connection with the conduct of affairs, as well as all legal and political students, had of the uniform interpretation of these words of the Constitution, which had been accepted and acted upon by the executive branch of the Government, it is almost a conclusive presumption that Congress accepted the words of the Constitution, in its adoption of them into legislation affecting the exercise of executive authority, in the same sense in which they had been accepted and acted upon by the executive branch of the Government.

This being so, it will be observed that in the case of vacancy now under consideration, arising by resignation, there is nothing in the operative enactment of this 3d section which, in terms or by any implication, affects, or purports to affect, the President's authority in filling the office, unless

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and until it shall have fallen into the predicament of "abeyance" described in the section. This condition of "abeyance" is limited to arise upon the expiration of the "next session of the Senate," without the office having been filled, "by and with the advice and consent of the Senate."

This predicament of "abeyance," in its application to the office made vacant by Mr. Kellogg's resignation, can only arise by the expiration of the next session of the Senate, without that body's having concurred in a full appointment to it. If that event should occur, then the operative enactment of the 3d section would come into play, and the office of collector at New Orleans would be for the time obliterated from the public service. But, until then, I cannot perceive that the power of the President to act upon the vacancy in the office, as it now stands, is affected by the provisions of this act.

I am therefore of opinion that, upon the well-considered and long-continued interpretation of this clause of the Constitution, the President has power to fill the vacancy in the office of collector at New Orleans, by granting a commission that shall expire at the end of the next session of the Senate, and that the "tenure-of-civil-office act" does not in terms, nor in intent, nor in legislative construction of this clause of the Constitution, affect this power of the President in the case submitted for my opinion.

The disposition I have made of the principal inquiry addressed to me doubtless supersedes the need of a definite consideration of the alternative advice which I am asked for, as to the possible modes of keeping open the port of New Orleans, and collecting the customs revenue there, in case the President had not the power of appointing a collector. I have, however, looked at those questions sufficiently to feel that they involve matters of much difficulty, and as the closing of the mouth of the Mississippi to foreign commerce and the transfer of that commerce to the Atlantic ports would be an occurrence of astounding influence upon vast interests, I am happy to find no em-

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barrassment in the regular official administration of the collection of the revenue at New Orleans from the defect of executive power in the premises.

I am, sir, very respectfully,
Your obedient servant,

WM. M. EVARTS.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

CASE OF THE COLLECTORSHIP OF CUSTOMS FOR ALASKA.

1. The case of an original vacancy is not affected by the "tenure-of-civil-office act" of March 2, 1867.
2. Where an office is created by a law taking effect during a session of the Senate, and no nominations are made thereto, the office may be filled by executive appointment during the recess of the Senate.
3. The opinion of Mr. Attorney General Mason in the case of the federal offices in Florida and Iowa (4 Opinions, 363) doubted.

ATTORNEY GENERAL'S OFFICE,
August 17, 1868.

SIR: In your letter of the 28th ultimo, you state that a law was passed just at the close of the late session of Congress, extending the customs laws over the territory of Alaska, and authorizing the appointment of a collector of customs for that territory, and that there was no time for a nomination to be made for the office before the adjournment of Congress.

Upon these facts you ask whether there is such a vacancy as can be filled by the President during the recess of the Senate, and, if not, what provision can be lawfully made for the execution of the customs laws in that territory until a collector can be appointed.

The case thus presented is one of original vacancy, and is therefore not within, or affected by, the act of March 2, 1867, "regulating the tenure of certain civil offices."

The power of the President to make a temporary appointment in this case depends upon the extent of his constitutional authority to "fill up all vacancies that may

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happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

The only consideration which the precise question here raised, upon a similar state of facts, appears to have received in this office, was given by Mr. Attorney General Mason, in an opinion touching the power of the President to fill the federal offices established by the act of March 3, 1845, admitting Iowa and Florida into the Union. (4 Opinions, 363.) Mr. Mason held that, where offices are created by law, taking effect during the session of the Senate, and no nominations are made, they cannot be filled by executive appointment during the recess of the Senate. If this opinion announces the correct constitutional doctrine, the President has no power to make a temporary appointment of a collector for Alaska.

It is to be observed, however, in regard to this opinion, that the view adopted is not supported by such a course of argument or reasoning as would imply an acquaintance, on the part of the learned Attorney General, with the full extent and scope of the constitutional question; and, further, that in another opinion, given a year afterward by Mr. Mason, there is abundant evidence that his views of the President's power to grant temporary commissions, in the recess of the Senate, were subsequently quite different from those indicated in the opinion on the case of the federal officers in Florida and Iowa; for, in the later opinion, he expresses his general concurrence in the construction of the constitutional provision under consideration adopted by his predecessors, and enforced by the continued practice of the executive department of the Government from the time of its establishment.

In an opinion which I have the honor to communicate herewith, in response to your inquiry as to the power of the President to fill the existing vacancy in the office of collector at New Orleans, I have stated the interpretation of the constitutional phrase, describing the vacancies that may be temporarily filled by the President, which has been adopted by my learned predecessors in this office, and in

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which I fully concur. Under that interpretation, I am unable to discriminate, in respect to the exercise of this constitutional power by the President, between cases of continuing vacancy in the recess of the Senate, which originate during the session by the new creation of the office, and those which so originate by a lawful termination of an incumbency. Certainly the need of the official service in the public interest is presumptively as great in one case as the other, and the executive duty of the President, for the discharge of which this constitutional power is vested in him, is not qualified by the circumstance that the office is to be filled for the first time.

The office to which you refer should be set in operation at once, unless some legal impediment to filling it exists. I do not find its case embraced within the operation of the tenure-of-civil-office act, and, under the accepted construction of the constitutional authority of the President, I have no doubt of his power to grant a commission to a collector of customs for Alaska, which shall expire at the end of the next session of the Senate.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

CASE OF THE OFFICE OF MINISTER TO VENEZUELA.

1. The office of minister to Venezuela passed into "abeyance" under the 3d section of the act of March 2, 1867, by the adjournment of the Senate on July 27, 1868, without having acted on the nomination of Mr. Stilwell thereto, made to that body on January 28, 1868.
2. Whether an office subsists and is vacant, or the office itself is abrogated, while the predicament of "abeyance" continues, is a question of verbal rather than of substantial distinctions.

ATTORNEY GENERAL'S OFFICE,
August 7, 1868.

SIR: I have considered the position of the office of minister to Venezuela, as placed before me in your letter of

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the 14th August, instant, and am of opinion, that by the adjournment of Congress on the 27th July ult., without the Senate having acted upon the nomination of Mr. Stilwell as minister to Venezuela, made to that body on the 28th January last, the office has, by the operation of the 3d section of the act of March 2, 1867, known as the tenure-of-civil-office act, passed into "abeyance," as that condition is described and defined in that section.

It follows that Mr. Stilwell is no longer to be regarded as United States minister to Venezuela, but whether the office subsists and is vacant, or the office itself is abrogated while this predicament of "abeyance" continues, is a question upon which I need not not give an opinion, as, indeed, it is a question rather of verbal than substantial distinctions. The question whether the President has a legal right now to fill this office, I must, under the enactment to which I have referred, answer in the negative. The clause of the act affixing the legal consequences to this condition of "abeyance" is as follows: "And if no appointment, by and with the advice and consent of the Senate, shall be made to such office, so vacant or temporarily filled as aforesaid, during such next session of the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office."

To effectually secure this "abeyance" of the office, subsequent sections of the act punish with fine or imprisonment, or both, any person who shall accept any appointment or employment in any office contrary to the provisions of the act, as well as any person guilty of making any such appointment, or making, signing, sealing, countersigning, or issuing any commission or letter of authority for or in respect to any such appointment. By further provisions of the same act, the payment, or receipt,

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or retention, of any money from the Treasury or public moneys of the United States, to or by any person appointed to, or authorized to act in, or holding or exercising, the duties or functions of any office, contrary to the provisions of the act, is also made punishable by fine and imprisonment, or both. (Act of March 2, 1867, secs. 5, 6, 9.)

Under these provisions, governing an office in "abeyance," in which condition the office of minister of the United States to Venezuela now is, I am of opinion that the President has not a legal right now to fill it.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. WM. H. SEWARD,
Secretary of State.

COMPENSATION OF AD INTERIM OFFICERS.

1. A person holding two compatible offices or employments under the Government is not precluded from receiving the salaries of both.
2. The act of September 30, 1850, precludes an officer who may perform, under an *ad interim* authority, the duties of another office, in which a vacancy exists, from receiving the compensation or salary provided for both offices.
3. In such a case the *ad interim* officer is not invested with a new office, but he is merely required to perform new duties.

ATTORNEY GENERAL'S OFFICE,
August 10, 1868.

SIR: I have the honor to acknowledge the receipt of your letter of the 24th ultimo, submitting for my consideration the question as to your right to receive the salary of the office of Attorney General from March 13 to July 20, 1868.

The act of February 20, 1863, empowered the President, in case of a vacancy in the office of the head of any executive department, whether permanent, as occasioned by death or resignation, or temporary, as caused by absence

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from the seat of Government or sickness, to authorize the head of any other executive department to perform the duties of the office until a successor was appointed, or until such absence or inability ceased. (12 Stats., 656.)

The case that happened in this office was the resignation of the Attorney General, Mr. Stanbery; and, under the act of 1863, you were authorized by the President, as the head of the Interior Department, "to act as Attorney General *ad interim*;" and you immediately entered upon the discharge of the duties pertaining to that office, which you continued to perform till my appointment as Attorney General. During this time you were in receipt of the salary provided by law for the Secretary of the Interior. The case appears, therefore, to be clearly within the prohibition of the act of September 30, 1850, which declares that "the proper accounting officers of the Treasury, or other pay officers of the United States, shall in no case allow and pay to one individual the salaries of two different offices on account of having *performed* the duties therefor at the same time." (9 Stats., 542.) The act contains an exception in favor of the superintendents of the executive buildings.

The history of this enactment is stated, I have no doubt correctly, by one of my learned predecessors, Mr. Cushing. It appears, as will be perceived, as a proviso to an appropriation, allowing Mr. Richard Rush a sum for occasional services performed by him as Attorney General *ad interim* between the years 1825 and 1829. Mr. Rush was at the time Secretary of the Treasury, Mr. Wirt being Attorney General. Mr. Cushing says: "A questionable practice, of recent introduction, existed, to allow to a head of department, or any officer thereof who performed temporarily the duties of another office by designation of the President, under the acts of May 8, 1792, and of February 13, 1795, the salary of such other office for the time being; and this act, while making appropriations for the settlement of Mr. Rush's claim according to the existing practice, established a different rule for any future cases of the same class." (6 Opinions, 83.) The construction and effect of this stat-

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ute of September 30, 1850, were considered by Mr. Cushing in the opinion from which I have quoted, and also by Mr. Crittenden in Aeiro's case, (5 Opinions, 766.) The former says: "Its effect is, that an individual holding an office shall not receive the salary of another which he does not hold, but of which, by temporary appointment or otherwise, he merely performs the duties. It does not prohibit the holding of more than one office with the salary of each, the wisdom or propriety of which is a thing for Congress to determine." Mr. Crittenden, after quoting the act, says: "The plain meaning of this seems to be, that an individual holding *one* office, and receiving its salary, shall in no case be allowed to receive also the salary of *another office* which he does *not hold*, simply 'on account of his having performed the duties thereof.' The prohibition is against his receiving the salary of an office that he does *not hold*, and not against his receiving the salaries of two offices which he *does legitimately hold.* If it had been the intention of Congress to prohibit in all cases the holding of a plurality of offices, that purpose could have been easily and directly expressed. The language they have used imports no such purpose, but is directed at an object and abuse distinct and separate."

The only question arising upon the construction of the act of 1850, in regard to which there has been any difference of opinion in this office, is that indicated in the last sentence of the foregoing passage from Mr. Crittenden's opinion; that is to say, whether the act in every case prohibited one person from holding and receiving the salaries of two different offices. One of my predecessors, Mr. Black, in an elaborate opinion, held that it did; but he afterwards followed the decision in the case of Converse *vs.* The United States, (21 How., 463,) that a person holding two compatible offices or employments is not precluded from receiving the salaries of both. (9 Opinions 123, 508.) But I find no contrariety of opinion on the point, as to whether the act of 1850 precludes an officer who may perform, under an *ad interim* authority conferred by the President, in pursu-

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ance of the statutes of 1792 and 1795, the duties of another office, in which a vacancy exists, from receiving the compensation or salary provided for both offices.

The view expressed is much clearer when considered in relation to the act of February 20, 1863, under which the President designated you to perform *ad interim* the duties of the Attorney General. The implication from that act is very strong that Congress intended to make it the official duty of each head of department to perform the functions of another executive department when called upon by the President in the case of a vacancy in the latter office or the inability of its chief to discharge its duties. He is not invested with a new office, but is required merely to perform new duties. The office remains vacant, while its duties and responsibilities are devolved upon the head of another department. There occurs simply an expansion of official duty, not a duplication of official character. There is nothing in the statute of 1863 to show that Congress intended to give any increased compensation to the *ad interim* officer; but, on the contrary, I think it clear, from the character and spirit of the legislation, that Congress intended that one salary should compensate the officer for his entire service in both offices.

Independently, therefore, of the act of September 30, 1850, I should think you were not entitled to receive the salary of the office of Attorney General during the time mentioned; but that act is a positive bar to the allowance of the claim.

I may mention that the principle of the act of 1850 is expressly incorporated into the late statute in regard to *ad interim* appointments, which provides that an "officer performing the duties of an office temporarily vacant shall not be entitled to extra compensation therefor." This provision has of course no effect in the present case, which is governed by the acts of September 30, 1850, and February 20, 1863.

I am of opinion that you are not entitled to receive, in addition to your salary as Secretary of the Interior, the

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compensation provided by law for the Attorney General, during the period of your performance of the duties of this office.

I am, sir, very respectfully,
Your obedient servant,
WM. M. EVARTS.

Hon. O. H. BROWNING,
Secretary of the Interior.

CASE OF DESERTERS FROM PRUSSIAN FRIGATE "NIOBE."

The provisions of the treaty of May 1, 1828, between the United States and Prussia, for the arrest and imprisonment of deserters from public ships and merchant vessels of the respective countries, applies to public vessels sailing under the flag of the North German Union and deserters from such vessels.

ATTORNEY GENERAL'S OFFICE,
August 19, 1868.

SIR: I have considered the opinion of the examiner of claims in your department, transmitted to me under cover of your letter of the 20th ultimo, upon the question, how far the treaty of 1828, between the United States and Prussia, on the subject of the arrest and imprisonment by the local authorities of each country of deserters from the ships of war and merchant vessels of the other, is obligatory upon the United States in respect to deserters from the public and private vessels sailing under the flag of the North German Union.

The result of the victory of Sadowa and the negotiations of Nicholsburg was the territorial enlargement of Prussia, by the annexation of Hesse Cassel, Nassau, Hanover, Holstein, and Frankfort, and the foundation of a confederation or union between Prussia, thus enlarged in territory and population, and the North German States, under a constitution of government which gave the king of Prussia the presidency of the union, with power to declare war and conclude peace, make treaties with foreign States, accredit ministers and receive them, likewise the

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command, in war and in peace, of the entire army and navy of the union, with power, whenever the public safety is threatened, to declare martial law in any part of the union.

Prussia has a treaty of commerce and navigation with the United States, dated May 1, 1828, which provides, that the consuls of the respective governments "are authorized to require the assistance of the local authorities for the search, arrest, and imprisonment of the deserters from the ships of war and merchant vessels of their country."

In April last application was made, under this provision of the treaty with Prussia, by the consul general of the North German Union in New York, to a United States commissioner, for a warrant for the arrest of eleven deserters from a public armed vessel, sailing under the flag of the union, which is styled by the minister of Prussia near this Government as "His majesty's frigate Niobe." The application of the consul general was refused by the commissioner, upon the general ground that the treaty stipulation referred to did not apply to vessels belonging to the North German Union. Baron Gerolt, the diplomatic representative here of the North German Union, protests against the refusal of the commissioner to issue a warrant for the arrest of these deserters; and hence the question is presented as to the validity of the objection urged by the commissioner to the right of the consular representative of the union to claim, on behalf of that government, in respect to deserters from one of its public armed vessels, the benefits of the treaty of 1828. The examiner of claims, in the opinion you have transmitted to me, has discussed not only this question, which is practically the only one that has been raised, so far as I am informed, by any events that have actually transpired calling for a consideration of our treaty relations with the States of the North German Union, but also the larger question as to the effect of the change in the political status and relations of the States consolidated and confederated with Prussia, upon the stipulations in our treaties of commerce and navigation with

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Prussia and those other States, in respect to the seamen deserting from their merchant vessels now sailing under a common national flag. I fully concur in the conclusion of the law officer of your department, that the commissioner at New York erred in refusing to issue a warrant for the arrest of the deserting seamen of the frigate "Niobe," but I will forbear at this time, with your permission, from giving an official opinion on the more doubtful and difficult questions which are discussed in the papers from your department now before me. It seems to me that a better occasion, perhaps, would be afforded for such a discussion when a case practically shall arise calling for the communication of the views of the Executive in regard to our treaties with the States of the North German Union to those judicial functionaries who, under our system of government, are intrusted with the due fulfillment and execution of those treaties on the part of the United States, in respect to the subjects-matter particularly discussed by the examiner of claims.

In regard to naval vessels of the North German Union, I am clearly of opinion that they are the ships of war of Prussia, within the meaning of the treaty of 1828, and that deserters therefrom may be arrested by the proper local authorities of the United States, on the application of the proper consular officer of the union, pursuant to that treaty. I have referred incidentally to those provisions of the constitution of the union, which declare as follows:

"The presidency of the union belongs to the crown of Prussia. The crown of Prussia is therefore entitled to represent the union as a nation, and to declare war and conclude peace in the name of the union, to form alliances and make other treaties with foreign States, accredit ministers and receive them.

"The aggregate land forces of the union shall form a single army, which, in war and peace, is placed under the command of his majesty the king of Prussia, as commander-in-chief of the union.

"The entire navy of the union is under the command

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of Prussia. Its organization belongs to the king of Prussia, who appoints its officers and officials, who take the oath of allegiance to him."

The construction and effect given by the examiner of claims to these provisions of the constitution of the German Union seem to be well supported by the course of reasoning pursued in his opinion; and I content myself at present with an expression of satisfaction with his view as applied to the case to which your attention has been directed by Baron Gerolt.

I would not be understood as entertaining any objection to the recommendation which the law officer of your department has deemed necessary to make looking to a review of our treaties with the States of the North German Union. The relations of the States of North Germany to one another and to the United States have been so considerably modified by the confederation of 1867, that many perplexing questions of reciprocal rights and obligations are likely to arise under those various treaties, and those questions it may be deemed the part of good statesmanship to avoid, by new treaties adapted to the present condition of the North German States.

I desire to remark, in conclusion, that under our system stipulations for the apprehension, within our jurisdiction, of deserters from foreign vessels, are executed by officers of the judicial department of the Government, in virtue of special authority conferred by acts of Congress. The questions arising upon the interpretation and effect of such treaties must, therefore, be peculiarly and primarily questions of judicial cognizance and consideration. The act of March 2, 1829, authorizes any court, judge, justice, or other magistrate, having competent power, to issue warrants for the arrest, for examination, of seamen deserting from the vessels of any foreign governments with whom we have treaties for the restoration of deserting seamen, upon the application of the consular officers of such governments, with authority to deliver up such seamen to such consular officers. The subsequent act of February

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24, 1855, confers upon commissioners of the circuit courts of the United States similar authority. The officers named in these statutes are not subject to the control or direction of the executive department of the Government.

Applications for the apprehension of deserting seamen are made to them directly by the consuls of foreign governments, and it may well occur that such applications are disposed of summarily, and before any opportunity can arise for intervention by the diplomatic representative of the foreign government, or the political department of our own Government. It may be of the highest consequence, that in a case involving the construction of such a treaty, full opportunity should be afforded both this and the foreign government for the presentation of their views upon the subject to the judicial functionary the exercise of whose jurisdiction has been invoked in the particular case. I apprehend that the learned commissioner, who refused to issue his warrant in the case of the seamen of the "Niobe," would have taken a different view of the treaty in question if his attention had been particularly called to those provisions of the constitution of the North German Union which I have referred to.

It may be proper, in case you agree with the view I have taken of that treaty in respect to public armed vessels under the flag of the North German Union, to make the district attorney of the United States at New York acquainted with your opinion, and to give such instructions to that officer as will enable him to make proper representation of that opinion to the commissioner or other judicial functionary in any future case of like character, and to advise your department of the occurrence of other cases arising under our treaties with the States of the North German Union that may call for renewed consideration of the subject by your department.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. WM. H. SEWARD,
Secretary of State.

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ANDERSON'S CASE.

It is necessary for the President to execute a formal act of removal in the case of an officer within the "tenure-of-civil-office act," sentenced to the penitentiary for crime, in pursuance of a resolution of the Senate advising and consenting to his removal.

ATTORNEY GENERAL'S OFFICE,
August 21, 1868.

SIR: I have considered the case of John H. Anderson, collector of internal revenue for the district of Virginia, sufficiently to find, that it is, at least, doubtful whether, under the peculiar provisions of the "tenure-of-civil-office act," he has yet been removed from that office, although it is stated that he has been for some months an inmate of the penitentiary.

I advise, therefore, that the President execute a formal act removing Mr. Anderson from that office, pursuant to the resolution of the Senate advising and consenting to his removal, and enclose herewith the draft of such an order as I deem it proper the President should sign under the circumstances of the case.

The other questions submitted to me, as arising in this case, are not free from difficulty, and I will consider and determine them when I am able to give further attention to the subject.

I am, sir, very respectfully,
Your obedient servant,
WM. M. EVARTS.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

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CASE OF DISTRICT ATTORNEY FOR EASTERN DISTRICT OF PENNSYLVANIA.

1. The "tenure-of-civil-office act" does not prolong the term of any office beyond that limited by law.
2. Where the office of district attorney became vacant by expiration of the statutory term during a session of the Senate, and the Senate adjourned without taking any acting on the nomination made by the President to the office, it was *held*, that the President had power, after the adjournment of the Senate, to grant a commission to fill the vacancy, to expire at the end of the next session of the Senate.

ATTORNEY GENERAL'S OFFICE,
August 21, 1868.

SIR: My attention has been called to the position of the office of United States attorney for the eastern district of Pennsylvania, with the suggestion that the public interests require that the office should be filled by an appointment, if it is open to the exercise of the executive power of appointment during the recess of the Senate.

Charles Gilpin, Esq., was appointed to the office March 15, 1864, and his term of office expired by statutory limitation March 15, 1868, during the session of the Senate. On the 20th April last the nomination of John P. O'Neill, Esq., to this office was sent to the Senate, but that body adjourned on the 27th July last without taking any action upon the nomination.

The 1st section of the "tenure-of-civil-office act," if unqualified by any provision to the contrary, would have had the effect of indefinitely prolonging the tenure of all offices embraced within its first clause until the appointment to the succession therein by and with the advice and consent of the Senate. But this consequence is precluded by the 4th section of the act, which is applied distinctly and exclusively to this result, and which reads as follows:

"That nothing in this act contained shall be construed to extend the term of any office the duration of which is limited by law."

It thus appears that the office of United States attorney for the eastern district of Pennsylvania is now vacant dur-

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ing the recess of the Senate, upon a vacancy beginning to exist by expiration of the term of office during the late session of the Senate. In my opinion it is competent for the President to grant a commission, to expire at the end of the next session of the Senate, to fill this vacancy. This has been the doctrine and practice of the Government, under the advice of my learned predecessors, in execution of the constitutional authority vested in the President during the recess of the Senate, as I have recently fully considered in my opinion given upon the vacancy in the office of collector at New Orleans.

Upon a most careful consideration of the text, and the apparent purpose and policy of the "tenure-of-civil-office act," I find no impediment therein to the execution of this constitutional authority of the President, in the sense and extent to which it has hitherto been exercised, in reference to a vacancy in office situated as that under consideration now is.

I therefore advise that it is competent for the President to fill the vacancy in the office of United States attorney for the eastern district of Pennsylvania, by issuing a commission to expire at the end of the next session of the Senate.

I am, sir, very respectfully,
Your obedient servant,
WM. M. EVARTS.

The PRESIDENT.

CASE OF UNION PACIFIC RAILROAD.

Duty of the President in reference to the Government subsidy for the Pacific railroad.

ATTORNEY GENERAL'S OFFICE,
August 22, 1868.

SIR: I have given a careful examination to the statutes regulating the construction of the Pacific railroads, in ref-

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erence to the duty of the Executive upon the commissioners' report of the satisfactory completion of successive sections of the roads, and find it not very easy to lay out a practical course for Executive action which shall observe at once the conditions of rapid opening of the roads to travel and security for the ultimate sufficiency of the structures.

I presume that I shall be able to suggest a course which will meet the full obligations of the Executive in these respects, but it will require more time and attention than I have as yet had at my command. I would, therefore, respectfully advise that the same course should be taken upon the sections of the Union Pacific railroad now ready for the advance of the Government subsidy as has been taken heretofore, and that any change which may finally be determined on may safely be reserved for future applications.

In the meantime the attention of the company has been called to the situation of the work, which has given rise to the solicitude of the Executive; and the propriety of satisfying the Government as to the progress of work on the sections heretofore accepted, to bring them up to the standard of permanent completion, will, doubtless, be pressed upon the company by the Government directors.

Before any further applications for subsidy will need to be acted upon by you, I shall have been able to give a full answer to the questions submitted to me.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

The PRESIDENT.

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COMPROMISE OF INTERNAL REVENUE SUITS.

The course of proceeding to be observed in execution of the 102d section of the act of July 20, 1868, relative to the compromise of suits under the internal revenue laws, considered and indicated.

ATTORNEY GENERAL'S OFFICE,
September 1, 1868.

SIR: Your letter of the 14th ultimo encloses the papers on file in your department relating to the case of the distillery of James Lynch, pending on writ of error in the circuit court of the United States for the eastern district of New York, and presents for the consideration of the Attorney General certain questions in regard to the procedure proper to be observed in administering the provisions of section 102 of the act of July 20, 1868, "imposing taxes on distilled spirits and for other purposes," which declare that no compromise of any suit or proceeding in court, under the internal revenue laws, shall be made without the recommendation of the Attorney General.

The application in the case of Lynch is the first to which the attention of the Attorney General has been called under this recent legislation. It is eminently proper, therefore, that the course of investigation and action to which similar applications shall be subjected hereafter should be determined now, upon due consideration of the intention of Congress and the correct principles of administration in such cases. The statute provides as follows:

"SEC. 102. *And be it further enacted*, That in all cases arising under the internal revenue laws where, instead of commencing or proceeding with a suit in court, it may appear to the Commissioner of Internal Revenue to be for the interest of the United States to compromise the same, he is empowered and authorized to make such compromise, with the advice and consent of the Secretary of the Treasury; and in every case where a compromise is made there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or officer act-

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ing as such, with his reasons therefor, together with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise; but no such compromise shall be made of any case after a suit or proceeding in court has been commenced without the recommendation also of the Attorney General: *Provided*, That it shall be lawful for the court at any stage of such suit or criminal proceedings to continue the same for good cause shown on motion of the district attorney."

The particular inquiry, upon the construction of this provision, which you address to this office, is, whether in the matter of an application for the compromise of a pending judicial proceeding, under the internal revenue laws, the opinions of both the Commissioner of Internal Revenue and the Secretary of the Treasury should be expressed before the case is referred to the Attorney General, or whether the sense and force of the word "recommendation" require that the opinion or advice of the Attorney General should be given before any action is taken in the case, by both or either of the other officers.

It will be perceived, on referring to the section of the act of 1868 just quoted, that the executive officers mentioned in connection with the subject of compromises, in cases arising under the internal revenue laws, are the Commissioner of Internal Revenue, the Secretary of the Treasury, the Solicitor of Internal Revenue, and the Attorney General, the latter having no duty to perform in cases of which the courts have not obtained jurisdiction.

The precise effect, if any, which is to be given to the opinion of the Solicitor of Internal Revenue, I will not now consider. The present inquiry does not require a determination of any question as to his authority and functions. The statute, it will be seen, does not indicate the order in which the officers named shall act, but it does require, before any compromise shall be made of a pend-

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ing suit, that the Commissioner of Internal Revenue, the Secretary of the Treasury, and the Attorney General shall concur in opinion that the compromise would be advantageous to the United States.

This requirement implies the duty of independent examination by each of those officers of every case presented for his action, and the grounds on which the proposal, submitted for his consideration, should be accepted or rejected. The duty imposed should be performed by each in good faith and upon an intelligent appreciation of the case and the considerations which are applicable to it, and which should control the action of the Government in regard to it. It is not a mere ministerial function that is performed by the officers to whom this important subject has been confided, but a delicate and important executive duty, which is devolved upon them by the statute.

The final authority and responsibility rest with the Commissioner of Internal Revenue. It is he alone who can actually compromise a claim arising under the internal revenue laws. The functions of the Secretary of the Treasury and the Attorney General are advisory.

The Commissioner may compromise with their consent. But even in a case where both of them advise and consent to a proposed compromise, I apprehend the Commissioner may, for good reasons, refuse to effect it. It seems to me, then, that before the Commissioner submits a proposal which has been made to him for the compromise of a case of this character to the Secretary of the Treasury, it should appear to him that it would be for the interest of the United States that a compromise should be effected.

Upon such submission of the case to the Secretary of the Treasury he may either refer it to the Attorney General for his consideration and action, or examine it, and form his opinion upon it, and afterwards send the matter to the Attorney General for his advice and recommendation. The order in which the Secretary of the Treasury and the Attorney General act upon the matter is not important, as each should give it an independent examina-

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tion, and express his individual judgment upon it, according to the views of the intention of the statute I have just indicated. I think the word "recommendation," employed in connection with the Attorney General, has no special signification, and does not imply that the Attorney General is to perform any different duty from that required of the Secretary of the Treasury. If the Secretary and the Attorney General both concur in the opinion that the compromise should be accepted, the Commissioner will be then authorized to make it. If they agree that the proposed compromise would be inexpedient, or if they differ in opinion upon that question, he is not authorized to accept it. But, as I have before remarked, he is not bound to make the compromise even where the Secretary of the Treasury and the Attorney General concur in recommending it. His original opinion as to the expediency of it may have changed pending its examination by the other officers. New information may have been communicated to him, or new considerations of public policy may have come into view after the matter has passed from his office, which may change or modify his original judgment upon the case. The discretion is finally exercisable by him, and it should be exercised intelligently, wisely, and conscientiously.

I believe the foregoing views contain an intelligible answer to the questions which you submit. The commissioner, I think, in referring the subject of a proposed compromise to you, may express, in terms or in substance, his opinion that it would be for the interest of the United States to accept the proposal; and you may then institute an examination of the subject and form your own opinion upon it, or suspend your judgment until you obtain the favorable recommendation of the Attorney General. I may be permitted to remark, that it would conduce to the proper examination of the cases which the Secretary of the Treasury and the Attorney General may be called upon to consider, if full reports, upon the facts and law which they

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involve, were prepared from the original papers or information in the office of the commissioner, under his direction, and by one of his subordinate officers. The cases, in other words, should be developed in the office of the commissioner before they are referred to you or come to this office. Such reports as I speak of may accompany the original papers in the cases, but such papers should always be accompanied by statements that will give this office an intelligent view of the facts which the papers may be supposed to verify, and, in most instances, of the statutory provisions on which the proceedings which it is proposed to compromise are based.

Referring now to the case of James Lynch, which you have submitted to this office, it appears that in this case the United States have obtained a judgment of forfeiture against the distillery of that person in the district court at Brooklyn. The claimant has sued out a writ of error from the circuit court. The case is spoken of in the papers as an "appeal" in that court. I apprehend, however, it is there on writ of error. It is suggested, as one of the grounds in favor of the compromise, that the case involves questions of law which are of doubtful decision; but, so far as I perceive, the papers in the case give no clear idea of what those questions are. I do not find that the bill of exceptions has ever been submitted to the Commissioner of Internal Revenue or to you. The authority for the character attributed to the questions made by the bill of exceptions is the report of the district attorney, but I do not think his report ought to be conclusive. We ought at least to know what the questions are, and see whether they are as doubtful as the local law officer thinks. The character of these questions may not absolutely control the final action of this office, but before determining the expediency and propriety of the compromise proposed, it is deemed prudent to request that you will ask the Commissioner of Internal Revenue to obtain, from or through the district attorney, for the use of this

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office, a copy of the bill of exceptions, or other statement of the case, on which the cause must ultimately be decided in the appellate tribunal.

I am, sir, very respectfully,

Your obedient servant,

J. HUBLEY ASHTON,

Acting Attorney General.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

SUBSIDIES FOR THE UNION PACIFIC RAILROAD.

The responsibility and duty imposed upon the President by law, in respect of the acceptance or approval of the structure and equipment of successive sections of the Pacific railroad preparatory to the issue of the Government subsidies thereon, considered and defined.

ATTORNEY GENERAL'S OFFICE,

September 5, 1868.

SIR: The question submitted to me, as to the degree of responsibility imposed upon the Executive by the acts in relation to the construction of the Pacific railroad, in respect of the acceptance or approval of the structure and equipment of successive sections of the road, preparatory to the issue of the Government subsidies thereon, have received my careful attention.

These questions are presented in their bearing upon the practical duties of the Executive under the following circumstances:

The standard of character and completeness of structure and equipment, which the legislation of Congress has prescribed for this work, is that assigned by the 4th section of the original act, (act of July 1, 1862,) as follows:

The road is to be "ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other

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iron used in the construction and equipment of said road to be American manufacture of the best quality."

The scheme of Government aid in the building of the road, of this character and completeness, provided by Congress in the act, is, that upon the completion of successive sections of the road, of the length originally of forty, but now of twenty miles, patents for lands along the road to a certain amount and bonds of the United States, as fixed in the act, shall be issued to the company thus become entitled to the same.

The means provided for due assurance to the Government that these successive sections of the road have been completed up to the standard prescribed by the act is as follows:

"Whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied" etc., (as above recited,) "*the President of the United States* shall appoint three commissioners to examine the same, and report to *him* in relation thereto; and if it shall appear to *him* that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue," etc. (Act of July 1, 1862, sec. 4.)

The 5th section of the act regulates the issue of bonds of the United States, and provides "That, for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States," etc.

Early in the progress of the work, thus authorized and encouraged by this legislation of Congress, it was perceived that the rule prescribed as a condition of the successive advances of the Government, to wit, that the separate portions of the incomplete work should be already of the

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character and equipment that the finished structure as a whole was required ultimately to arrive at, was one which needed for its construction a consideration of the nature of the work and of the main policy of the Government in securing its proper and speedy execution, or the objects of the whole legislation might be embarrassed or defeated.

Accordingly, in February, 1866, a board was convened by Mr. Harlan, Secretary of the Interior, composed of the Government commissioners, (who had been appointed under the section of the act above recited,) the Government directors of the Union Pacific Railroad Company, and the presidents and other representatives of the several companies engaged in constructing the Pacific railroad and its branches. This board was convened "for the purpose of adopting some uniform standard of road to which the several companies organized under the acts of July 1, 1862, and July 2, 1864, shall conform," and its deliberations resulted in the adoption by the board of a standard for the work, in detail and with specification, which was presented, in the form of a report, on the 24th of February, 1866, to the Secretary of the Interior. The Secretary of the Interior, on the same day, acknowledged the receipt of the report, and proceeded to state that "the results arrived at by the board, as embodied in the report it has adopted in regard to the construction of the road, are approved, and it is hereby directed that said report be used by the directors and commissioners as a guide for their action in directing or accepting the work."

The appointments of commissioners, made by the President of the United States in pursuance of the acts, have been with the authority and duty, as expressed in the appointment, "to examine, under instructions from the Secretary of the Interior, the several sections of" etc., "as they may from time to time be completed, and to make report thereon in the manner contemplated by said acts."

In communicating the appointments to the commissioners named therein, the Secretary of the Interior has given

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his "instructions" for the execution of their duty, as follows: "In case you accept the appointment, you will be guided in the discharge of your duties as commissioner by the instructions embodied in the report of the board convened to determine on a standard for construction of the Pacific railroad, dated February 24, 1866, a copy of which is herewith enclosed."

Under the system thus established, reports from time to time have been made by the commissioners thus appointed and instructed, certifying to the completion of the successive sections of the road, and thereupon, upon the approval of the President, the patents for land have been issued by the Secretary of the Interior, and the bonds of the United States by the Secretary of the Treasury.

It is now suggested, that the action of the Government, in advancing the subsidies upon the certificates of the commissioners, (which certificates are based upon the principles of the report of February 24, 1866, adopted by the Government as a standard for the acceptance of the successive sections as *complete*,) will lead to this inconvenient result, to wit, that the full subsidies will have been advanced upon successive sections of the road, which, as separate sections were only as complete in structure and equipment as in their relation to a line of railroad as yet incomplete in structure and equipment they could properly be required to be, and that the Government will have in its power no adequate security that these successive sections will be brought up, in the progress of the whole work, to that full standard of ultimate completeness, as parts of a finished line of railroad, which the acts of Congress contemplate, and to which the principles of the report of February 24, 1866 are not inattentive.

The point and importance of this suggestion can better be understood by a reference to a few prominent features in the "standard" adopted by the Government, which illustrate the distinction taken between what may be called a *provisional* and an *absolute* sufficiency of the struc-

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ture and equipment of the road. Thus the report of February 24, 1866, lays down these rules upon the subjects to which they refer:

"*Mechanical Structures.*—Culverts and abutments for bridges and drains should be of stone, whenever a durable article can be obtained within a reasonable distance, say from five to eight miles, depending upon circumstances; provided, that temporary trestles may be adopted, upon assurances, to the satisfaction of the commissioners, that stone abutments will be substituted immediately after the line shall be opened, so that stone can be transported thereon. But if good stone be too remote, then hard-burned brick or under trestle-work may be adopted; the wood to be of the most durable character the country will afford, and the wood or brick to be replaced by stone when that material can be conveyed conveniently by rail."

"*Ballasting.*—A railroad cannot be considered complete until it is well ballasted. If composed of ground or broken stone, it should be from twelve to twenty-four inches thick, depending on the lower material. In view of the settling of new embankments, which require time and rains before ballasting can be properly placed, and also in view of the number of miles required by the law to be constructed annually, the perfect finish of the road-bed in this respect must be progressive and the work of time. Yet, it is the opinion of the board that such work of perfecting the structure must proceed as usual on first-class railroads; otherwise subsequent sections should not be accepted, because the whole work is not then being carried forward as a great Pacific railroad, such as the law contemplates."

"*Rolling Stock.*—Locomotive engines and cars must be provided in liberal proportion to the traffic and the convenient construction, to be increased from time to time as the completion of additional sections and the increase of business seem to require."

It will be observed that this "standard" (which was furnished by the practical wisdom of the board convened

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for that duty, and which was adopted by the Government as a guide for the Government directors and commissioners in directing and accepting the work) itself recognizes the propriety and necessity of a subsequent or ultimate revision of the road which in its successive sections has been "accepted" as satisfying the "standard," and has received the Government subsidy, in order to see that the absolute completeness which, in the nature of the enterprise, could not be exacted as a condition precedent to the advances upon successive sections as presented for acceptance was, nevertheless, being made good as thoroughly and as rapidly as the necessary expiration of time and the accruing facilities of transportation would permit.

Thus, in respect of "mechanical structures," the "standard" permits acceptance of successive sections, under certain circumstances, with "temporary trestles," "upon *assurances*, to the satisfaction of the commissioners, that stone abutments will be substituted *immediately* after the line shall be opened, *so that stone can be transported thereon.*"

So, in regard to "ballasting," the "standard," submitting to the exigencies which must postpone ballasting until after the sections shall have been accepted and advanced upon as complete, yet requires that the "work of perfecting the *ballast* must proceed as usual on first-class railroads," and that in default of this, "subsequent sections should not be accepted."

So, too, the complement of "rolling-stock," though satisfactory at the stages of the work at which successive sections of road may have been accepted as complete, in equipment as well as structure, is "*to be increased from time to time, as the completion of additional sections* and the increase of business seem to require."

I am of opinion that the true meaning of the 4th section of the act of 1862 is, to submit to the final judgment of the President whether the work, in structure and equipment, is in due conformity with the requisitions of the act, and that the service of commissioners to examine and report to him is but an administrative aid furnished to the

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President in the discharge of this executive duty. Nor have I any doubt that the course of the Executive hitherto, whether under your own administration or that of President Lincoln, has been a just and judicious discharge of the discretionary responsibility thrown upon the Executive by this provision of the act. The usual steps of procedure for satisfying the Executive that the company is entitled to the Government subsidies from time to time have all been kept within the administrative control of the Executive. Thus the appointment of the commissioners requires the performance of their duty "under instructions from the Secretary of the Interior." The advisory report of the "board" convened in February, 1866, acquired the authority of a standard for the execution and acceptance of the work in its successive sections from its adoption by the Secretary of the Interior and its communication to the commissioners as their guide in the performance of their duty. In all this, the action of the Secretary of the Interior was the action of the Executive under the authority of the President; such action of the Secretary being made the law of the conduct of the trust reposed in the commissioners by the express terms of their appointment by the President.

Nor do I entertain any doubt that this method of procedure was a competent and useful discharge of the executive duty in the premises. The whole policy of the legislation of Congress, as shown in the original and amendatory acts, is most manifestly to give liberal and seasonable subsidies, which will themselves be available to the companies as means in the construction and equipment of the work in short and frequent stages of its progress, and the basis, in great part, of their credit in gaining from the community, in the shape of loans or stock subscriptions, the further means needed for the rapid and thorough completion of the whole line. The action of the advisory "board," and its approval by the Executive, in adopting a standard which recognized the distinction which the nature and the exigencies of the enterprise required to be drawn, in some

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particulars, between a provisional and an absolute completeness of the work in its successive stages, seem to me entirely justified by the provisions of the acts. The main policy of the acts was to foster and press on the work, and their provisions exhibit a sensible deference to the practical conditions of its rapid and successful completion not to be misunderstood.

But, upon the same reasons, and, indeed, in pursuance of the same method hitherto followed, I am of opinion that it is entirely competent to the Executive, through further instructions from the Department of the Interior to the commissioners, and by means of further inquiry and advice from competent engineers and experts in the construction and management of railroads, to provide for a revision of the work in the particulars in which a provisional completeness of successive sections was accepted, subject to an obligation on the part of the companies to make good, as far and as fast as might be, what needed subsequently to be supplied. And it will be competent to the Executive to give substantial force to this right and duty, thus far held in reserve, by refusing acceptance to future sections, which come up only to the standard of provisional and not absolute completeness, or by requiring the "assurances" of the companies, or their admitted obligations, to make up the temporary deficiencies, which have hitherto been relied on by the Government, to be strengthened by the deposit or reservation of a reasonable amount of securities to assure due performance of these obligations.

In what form and to what extent this authority of the Executive, for which I thus find a legal warrant, should be interposed, is a question of practical administrative discretion. It is, however, proper that I should add, that the main policy of the legislation of Congress, in securing a rapid as well as thorough execution of the great work of a through railroad line to the Pacific, which has thus far been fully maintained in the action of the Executive, does not need to be, and should not be, departed from.

It cannot as yet be assumed that the work, in its past

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sections, has not been brought up as far and as fast as a just and fair expectation of the Government should require, in the particulars in which the "standard" hitherto insisted upon by the Executive has admitted of temporary incompleteness. Or if the representations made to the Government seem to render this probable, still the extent of such blamable deficiency does not as yet appear by any responsible survey, or by the concurrent assent of the company or companies. On the other hand, it is, I conceive, indisputable, that the long reach of the road, and the length of time in which future sections of the roads are to be presented for acceptance and for the advance of the subsidies, will furnish adequate opportunities for the due protection of the executive duty in the premises.

The result of my consideration of the subject, therefore, is, that it is competent for the Executive to apply to the present situation of the whole work the standard of completion, both of structure and equipment, which has been deliberately and wisely, as I think, adopted, and to ascertain in what condition the work stands in those particulars to which attention has been called; and, in doing this, it will be competent for the Executive to maintain the general principle of advances upon the sections, from time to time proposed for acceptance, as only provisionally complete, and yet, upon evidence that the supplemental work on past sections is not being adequately brought up, to enforce upon the companies due attention to their obligations in this behalf.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

The PRESIDENT.

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ELLIOTT'S CLAIM.

A claim for the use and occupation of real estate in Tennessee, seized and used by the army in January, 1863, cannot be settled by the executive department of the Government, under the act of July 4, 1864 and the act of February 21, 1867.

ATTORNEY GENERAL'S OFFICE,
September 7, 1868.

SIR: The matter of the claim of Thomas A. Elliott, as presented in your recent letter and the accompanying report of the board of claims in your department, has received the careful consideration of this office.

The case is this: In January, 1863, the military authorities seized a brick storehouse in the town of Murfreesboro, Tennessee, for the use of the subsistence department of the army, and the property was occupied by that department for a period of two years and six months. The owner, Mr. Elliott, demanding payment for the use and occupation of his premises, submitted his claim to the Quartermaster General for examination and settlement under the provisions of the act of July 4, 1864, authorizing "the payment of certain demands for quartermasters' stores and subsistence supplies furnished to the army of the United States." The claimant is a citizen of Tennessee, whose loyalty during the rebellion is unimpeached. No lease or other express contract for the payment of rent, I understand, was at any time entered into between the Government, or any officer, and the claimant. The Quartermaster General rejected the claim. The late claims commission connected with the War Department was of the opinion that it should be allowed.

It is plain that the Quartermaster General was right in refusing to adjust the claim under the act of July 4, 1864. At the date of that statute Tennessee was in the predicament of rebellion. Her loyal citizens, therefore, were not entitled to its benefits. They became so entitled on the passage of the joint resolution of July 28, 1866, which, in

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terms, extended to them the provisions of the act of July 4, 1864. That act, however, authorizes the Quartermaster General to adjust claims for quartermasters' stores taken and used by the army, with or without receipt, and such claims alone. Unless, therefore, the use and occupation of real estate, lands, and houses, by the military forces, can be held to be within the designation of "quartermaster's stores," in the sense of the statute of 1864, there is no color of authority for the settlement of the present claim under that law. It will be conceded that they are not embraced by the terms "subsistence" stores. If they are not within the descriptions of the other class of "stores" mentioned in the act, they must be beyond its purview. This appears to be the pivotal point of the case. It is, however, of very easy solution.

I cannot concur in the apparent view of the late claims commission, connected with your department, that all subjects which are within the charge and control of the Quartermaster's department may be matters of claim before the Quartermaster General under the authority and according to the right conferred by the act of 1864. The words of description employed in the statute plainly comprehend only articles of movable property, which it is the authority and duty of the Quartermaster's department to purchase and dispose of for military use, and for the procurement of which the ordinary and regular appropriations for that department provide the means. There is evidence everywhere on the face of the statute that the attention of Congress was directed merely to claims for that class of subjects, and that its intention was to provide for their payment alone.

If this is not clear to every one who carefully reads the statute, argument will not help him. There is no doubt that the Quartermaster's department is charged with the hire of quarters for officers and troops, of storehouses, and of grounds for cantonments and other military uses, and that annual appropriations are made covering expenditures for those objects; but it would do violence not only to the

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common, but as well to the technical, meaning of words to hold that those subjects are "quartermasters' stores;" and until some better proof is given that Congress meant to include them within that designation than the mere fact that they are under the control of the Quartermaster's department, the *norma et usus loquendi* must control the construction of the statute, and claims like the one under consideration must be regarded as excluded from its operation. A reference to the provisions of the act of February 21, 1867, will demonstrate the correctness of this view of the true construction of the statute of 1864. This act of 1867 is entitled an "Act to declare the sense" of the preceding statute. Under the statute of 1864 a question had arisen, whether the jurisdiction therein conferred upon the Quartermaster General and the Commissary General of Subsistence extended to all claims of loyal citizens of States not in rebellion, for the value of quartermasters' stores and commissary supplies taken by, or furnished to, the army, or was limited to the claims of such citizens which originated in the loyal States. Mr. Attorney General Speed, in an opinion given to the President on the 25th of November, 1865, held, that the latter was the true construction of the act, and that it must appear not only that the domicil of the claimant was in a loyal State, but also that the *situs* of the claim was in such a State, in order to entitle the party to the relief granted by the law. The statute of 1867 is in effect, perhaps, a legislative declaration that the construction adopted by Mr. Speed expressed the true intent and meaning of the act of 1864; for it prohibits the payment of any claim for "supplies or stores taken or furnished for the use of, or used by, the armies of the United States," as well as of other claims that are mentioned which originated during the war for the suppression of the southern rebellion in an insurrectionary State.

Now, it will be observed that in describing those claims, the payment of which it was the design of the act of 1867 to prohibit, Congress first mentions, in terms almost identical with those used in the act of 1864, "claims for sup-

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plies or stores taken or furnished for the use of, or used by, the armies of the United States," and then proceeds to mention claims "*for the occupation of, or injury to, real estate;*" and, finally, claims "for the consumption, appropriation, or destruction of, or damage to, personal property" by the troops of the United States. The inference is irresistible that, in the view of the legislature, claims of the two last classes were not embraced by, or included within, the class first mentioned; that is to say, that claims for the "occupation of real estate" could not be preferred as claims for "supplies taken or furnished for the use of, or used by, the armies of the United States."

This is the entire commentary I desire to make at present upon the statute of February 21, 1867, except to say, that the proviso in reference to the joint resolution of July 28, 1866, simply saves to the loyal citizens of Tennessee the benefit conferred by that measure, which, as I have said, merely is that their claims for quartermasters' stores and commissary supplies shall be settled to the same extent and in the same manner as claims of the same description preferred by citizens of States that remained loyal to the national Government and Union.

I am clearly of opinion, that the claim of Mr. Elliott cannot be settled under the legislation to which I have referred.

I am, sir, very respectfully,
Your obedient servant,

J. HUBLEY ASHTON,
Acting Attorney General.

Hon. J. M. SCHOFIELD,
Secretary of War.

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COMPENSATION OF OFFICERS OF FREEDMEN'S BUREAU.

1. The word "compensation" in the 4th section of the act of July 16, 1866, includes pay and emoluments.
2. The act of July, 1868, continuing in force the bureau, does not require that officers "retained" by the Commissioner shall be in terms reappointed.

ATTORNEY GENERAL'S OFFICE,
September 12, 1868.

SIR: You have asked the opinion of the Attorney General upon certain questions involving the construction of the provisions of the acts of July 16, 1866, and July, 1868, continuing in force the bureau for the relief of freedmen and refugees, relative to the compensation of officers of that bureau.

These questions are stated in the communication of July 31, 1868, addressed to you by Major General Howard, which you have referred to this office.

1. The first question submitted is, "Does the word 'compensation,' in the act of July 16, 1866, sec. 4, include pay and emoluments, *i. e.*, pay proper, subsistence, quarters, and fuel, and servants' pay?"

The 4th section of the act of July 16, 1866, provides "that officers of the veteran reserve corps or of the volunteer service, now on duty in the freedmen's bureau, as assistant commissioners, agents, medical officers, or in other capacities, whose regiments or corps have been, or may hereafter be, mustered out of service, may be retained upon such duty as officers of said bureau, with the same *compensation* as is now provided by law for their respective grades."

There seems to me but little, if any, room for doubt that Congress intended, by this provision, to allow to the military officers therein mentioned, who should be retained upon duty in the bureau, the pay and allowances belonging to their respective grades in the military service under the then existing provisions of law. This is manifest, I

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think, as well from the language employed in the section, as from the other parts of the same act and corresponding provisions of the previous statute relating to the assignment of army officers to duty in the bureau. The act of 1868, while authorizing such officers to be detailed for duty there "without increase of pay or allowances," obviously contemplated that they were to receive the same pay and allowances to which their commissions in the military service entitled them, no other provision for their compensation being made. So, likewise, the corresponding clause in the act of 1866, which authorized military officers to be assigned to duty in the bureau, without "increase of pay and allowances," clearly had in view the same thing. The object of the 4th section of the act of 1866 was to enable veteran reserve or volunteer officers assigned to duty in the bureau to be continued on such duty after their regiments or corps were mustered out of the service, but it introduced no new rule for their compensation. The officers so continued or retained on duty were to receive the same compensation then provided by law for their respective grades (not in the bureau, but) in the army; in other words, the pay and allowance appropriate to the rank which each held in the army, subject to the same regulations which govern allowances for officers in the military service.

The term "*compensation*," is one of great breadth and generality, and I cannot give to it a more restricted sense and application than was attributed to the term "*emolument*," in a similar connection, by Attorney General Black, who held that the latter word, as used in the military laws, included every allowance or perquisite arising from, or annexed to, the possession of an office, if it be given to the officer for his own personal use and benefit and by way of compensation for services rendered. (9 Opinions, 284.)

Mr. Wirt, in an elaborate opinion, has shown with how little uniformity and precision of thought Congress had used, up to the time he wrote, the general terms employed to describe the compensation intended to be given to mili-

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tary officers. He says, "they are in their sense so broad, and used with so little uniformity, as to prove that the legislature attached no precise or definite ideas to them," (1 Opinions, 477.) In that opinion, Mr. Wirt held that while the act of Congress then in force gave the Surgeon General a *salary* of $2,500, he was entitled, the same as other officers, to an allowance for fuel and quarters.

The critical observations to which I have referred, in Mr. Wirt's opinion, apply as well to the numerous laws on the subject of the compensation of military officers which have been enacted since he wrote. The late act in regard to the freedmen's bureau, when it comes to provide for the compensation of the officers, speaks of the "same pay, compensation, and all allowances;" but I apprehend nothing is given by the word "compensation" that would not have been given by the words "pay and allowances," just as I think nothing is withheld under the act of 1866, by the employment of the word "compensation," which would have been conferred if the terms "pay and allowances" had been used instead. The accumulation of terms noticeable in the 4th section of the act of 1868 was probably suggested by some question or doubt (not well founded as I think) which may have been raised as to the limited meaning and effect of the word "compensation" used in the 4th section of the act of 1866.

If any thing is to be inferred at all from the character of the phraseology of the act of 1868, in the particular mentioned, it is, that Congress intended by the act of 1866 to give officers of the bureau mentioned in the 4th section precisely the same pay and allowances provided for their respective grades in the army.

2. "Does the act of July, 1868, require that officers retained by the Commissioner shall be reappointed?"

The 4th section of this act is substantially a re-enactment, with slight modifications, of section 4 of the act of 1866. It enables veteran reserve and volunteer officers to be kept on duty after they themselves have been mustered out of service. The provision in the act of 1866 had

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reference to the retention of such officers after their regiments were mustered out. The object of the late law is to continue the old officers on duty so long as their services may be required; but, to effectuate this, a reappointment does not seem necessary. The object may be sufficiently attained by the Commissioner signifying his desire to retain the officers in any mode he may deem proper; and a designation thus made will operate as an appointment.

3. "Is the act of July, 1868, retrospective? Does it entitle an officer who has been retained to the pay and emoluments of an officer of the army of the same grade, from the date of his appointment as 'an officer of the bureau,' after his muster out of the military service?"

It is difficult to say what the intention of Congress was as to the effect of the 4th section of the act. The section is very obscure. It was probably drafted with reference to a state of facts, in regard to the officers of the bureau, which is not known to me. But, I think, in view of the construction which I have put upon the corresponding section of the act of 1866, no practical difficulty need arise in applying this section; for, as I understand the subject, officers retained in the bureau before the passage of the act of 1868, after being mustered out of service, and subsequently again retained, in pursuance of the act of 1868, will get no greater compensation upon a construction of that act which would give the 4th section a retrospective operation, than they are entitled to receive upon a construction which refers the "appointment" mentioned in that section to the retention of the officer by the Commissioner after the act of 1868 went into effect and under its authority.

Those officers are entitled, under the 4th section of the act of 1866, to receive, as compensation for their services in the bureau, the pay and allowances of their respective grades, at the dates of their muster out, up to the time of their retention, under the authority of the 4th section of the act of 1868. From that time their compensation is regulated by the provisions of that act; but the regulation

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there prescribed is not different from the rule of compensation prescribed by the 4th section of the act of 1866, according to the construction and effect which I have given to it.

I am, sir, very respectfully,

Your obedient servant,

J. HUBLEY ASHTON,

Acting Attorney General.

Hon. J. M. SCHOFIELD,

Secretary of War.

WRECK OF STEAMSHIP "SCOTLAND."

Where Congress appropriated a sum of money, to be expended under the direction of the Secretary of War, for the removal of a wreck near the harbor of New York, and the Secretary of War contracted with a company to remove the wreck, it was *held*, that the contractors had the right to proceed with the work as against any persons employed by the owners, and that the Secretary of War had power to aid them with all the necessary force to enable them to remove the obstruction.

ATTORNEY GENERAL'S OFFICE,

September 21, 1868.

SIR: Your letter of the 15th instant directs my attention to the action of certain parties in New York who have interfered, or attempted to interfere, with the exercise by your department of its just authority under the recent act of Congress appropriating $100,000, to be expended under the direction of the Secretary of War, for the removal of the wreck of the steamship "Scotland," on the bar outside Sandy Hook, near the entrance to the harbor of New York.

You ask my opinion on the general subject, without presenting any specific question of law for my determination. The only facts of the case brought to my attention are stated in a communication addressed to the United States district attorney in New York by the engineer officer stationed in that city.

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Wreck of Steamship "Scotland."

The iron steamship "Scotland" was wrecked, it appears, in December, 1866, and now lies on the bar outside of Sandy Hook, near the entrance to the harbor of New York, a dangerous obstruction to navigation. The owners or underwriters failing to remove the wreck in proper time, Congress appropriated, by act of July 28, 1868, $100,000, to be expended under the direction of the Secretary of War, for that purpose. The Secretary was required to make a contract for the work with the lowest bidder, after due advertisement, as provided in the law. This has been done. The contract for removing the wreck was awarded to the Neptune Submarine Company of New York. It is stated that the operations of these contractors are interfered with by the New York Submarine Company, who are at work upon the wreck, and who have notified the contractors with the Government not to proceed with the execution of their agreement.

The New York Submarine Company allege that they have been authorized by the owners of the wreck to save the property, and claim that their right to engage in the work is superior to that of the contractors with the Government.

But the claim is not maintainable in law, and should not be acquiesced in by the Government. The authority, and perhaps the duty, of Congress, under its constitutional power to regulate commerce, to provide for the removal of this dangerous obstruction to navigation in a most important locality, cannot be doubted. Mr. Justice Story, speaking of the objects to which the power to regulate commerce may be constitutionally applied, says, "it extends to the construction of light-houses, the placing of buoys and beacons, the removal of obstructions to navigation in creeks, rivers, sounds, and bays, and the establishment of securities to navigation against inroads of the ocean." (2 Story on Const., sec. 1075.)

The exclusive and paramount authority of the agents selected by the Government to engage in the work of removing this wreck proceeds from the constitutional

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supremacy of the legislation of Congress on this subject. The contractors have the undoubted right to employ, against any owner or underwriter, or any agent of one or other of them, all the force requisite and fairly applicable to the attainment of the end of the authority with which the legislation of Congress and the contract made in pursuance thereof have invested them. And as they are the agents of the Government, duly selected by your department to carry out the object of Congress, I think you have the right to aid them with the necessary force to obtain control over the waters in the neighborhood of the wreck, and to enter upon the work which they are authorized and have engaged to perform.

It is stated in the letter of the engineer officer, to which I have referred, that the contract of the Neptune Submarine Company includes, as part compensation for their labor, all interest of the United States in the proceeds of the wreck and cargo removed.

I determine no question touching the interest of the Government, or those who have contracted with it, or of any other parties, in the property after it shall have been removed from the place where it now lies. If the Neptune Submarine Company and the New York Submarine Company have rights, conflicting or otherwise, in respect to this property, they can be asserted in the proper forum, and may be judicially ascertained after the removal of the wreck.

The only observation necessary to be made upon the provision to which I have referred in the contract of the United States with the former company is, that it does not change or modify the legal relations of the contractors to the subject-matter, or to the Government, whose agents they are, in the execution of the law of Congress authorizing and requiring the removal of this wreck.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. J. M. SCHOFIELD,

Secretary of War.

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THE LOUISIANA BELLE.

The act of February 21, 1867, prohibits the payment of compensation for the services of a steamboat under military impressment in Louisiana, in 1862 and 1863, though owned in Ohio and licensed to trade at New Orleans after the port was opened to commerce.

ATTORNEY GENERAL'S OFFICE,
September 30, 1868.

SIR: I have had under consideration the claim of the owner of the steamboat "Louisiana Belle," for compensation for the services of that steamboat while under military impressment in the waters of Louisiana, sometime in the year 1862 or 1863.

Three questions in respect to this claim are propounded by you, as follows:

1. Do the facts in this case warrant the conclusion that there was a contract implied to pay for the services of this boat on a *quantum meruit?*

2. This boat being owned by a loyal citizen of the State of Ohio, and licensed to trade at the port of New Orleans after it had been declared open to commerce, and while so engaged at the said port being impressed into the service of the United States, can this claim for services arising thereupon be settled and paid?

3. Does the act of Congress of February 21, 1867, prohibit the payment of this claim, if it be decided that it arose under a contract, express or implied, in the State of Louisiana?

The facts upon which these questions arise are stated in your letter substantially as follows:

The steamboat "Louisiana Belle," under the ownership of George Alexander, a loyal citizen of Ohio, was duly enrolled and licensed at the port of New Orleans soon after that port was opened to commerce. Afterwards the boat was impressed into the military service of the United States as a transport, under an order from the headquar-

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ters of the department of the Gulf. The owner and crew continued on board under the pay of the Government, and managed the vessel under the direction of the Quartermaster's department.

After the death of the owner, who was killed by the enemy, on a military expedition in which the boat was engaged, she was sold, by authority of some judicial order, to Messrs. Lapine & Boyer, under whose ownership she continued in the same service. This sale occurred November 16, 1863. It appears that the Government afterwards bought her, paid the price agreed upon, and settled with Lapine & Boyer at a fixed rate for the use of the boat from November 16, 1863, to the time that the United States purchased.

The present claim is preferred by the heir of the original owner, who is a loyal citizen of Cincinnati, Ohio, for compensation for the use of the boat during the time she was employed by the Government under the ownership of the decedent.

The case, therefore, seems to be one of impressment, and a case in which no express agreement, verbal or written, was ever made by the military officers who seized her, for the payment of compensation for the use of the property. I take it that the settlement with Lapine & Boyer was made before the passage of the act of February 21, 1867.

I now reply to the questions you submit.

1. It has been held repeatedly by the Court of Claims that the Government cannot be sued in actions sounding in *tort*, nor made liable for the tortious acts of its officers. (2 Court of Claims, Rep. 415.) If the Government is liable at all, therefore, to make compensation for the services of this vessel, it is liable as upon an implied contract.

2. But this subject cannot be of any practical importance to the executive department when viewed in connection with the inquiry involved in the second and third questions you submit, as I am of opinion that the act of February 21, 1867, to which those questions relate, interposes an absolute bar to the settlement and payment of this claim

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by the executive department of the Government. The act of February 21, 1867, provides that the act of July 4, 1864, chap. 240, "shall not be construed to authorize the settlement of any claim for supplies, etc., nor for the consumption, *appropriation*, or destruction of, or damage to, personal property by the military authorities or troops of the United States, where such claim originated during the war for the suppression of the southern rebellion, in a State, or part of a State, declared in insurrection by the proclamation of the President of the United States, dated July 1, 1862, or in a State which, by an ordinance of secession, attempted to withdraw from the United States Government: *Provided*, That nothing herein contained shall repeal or modify the effect of any act or joint resolution extending the provisions of the said act of July 4, 1864, to the loyal citizens of the State of Tennessee, or of the State of West Virginia, or any county therein." (14 Stats., 398.) The true construction and effect of this statutory provision was carefully and elaborately considered by Mr. Attorney General Stanbery, in an opinion rendered on the 4th of February last, upon the claim of Brott & Davis, for compensation for the loss of a boat while in the public service, under an impressment by the military authorities, during the rebellion, in an insurrectionary State. The conclusion to which the learned Attorney General arrived was, that the claim was included within the class of claims mentioned in the statute under the description of claims "for the consumption, appropriation, or destruction of, or damage to, personal property by the military authorities," and that its settlement was therefore prohibited by the act. The only distinction between the claim in the case of Brott & Davis, and the claim now under consideration, is, that the one is for the value of a boat impressed into the service and then lost or destroyed, while the other is a claim for compensation for the use of similar property seized and employed in the public service. But the distinction does not amount to a legal difference.

The term "appropriation," in the sense of this statute,

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must be held to include a seizure or impressment of private property as well for temporary as for permanent possession and use. This matter appears to have been considered and decided quite recently by the Court of Claims in the case of Ayres *vs.* The United States, where it was judicially held that the temporary occupation of a building by military authority at Memphis, without lease, was an "appropriation" of the property within the meaning of the 1st section of the act of July 4, 1864, (13 Stats., 381,) and that as such the claim was excluded from the jurisdiction of that court.

In view of this construction of the statute of February 21, 1867, which may be regarded as the settled construction of this office, the present claim is within the prohibition of the act, and cannot be settled by the accounting officers.

The act of 1867, although entitled "An act to declare the sense" of the statute of July 4, 1864, cannot be otherwise considered than as a legislative prohibition upon the settlement of claims of the character which it describes. "Laws declaratory in name," says Mr. Dwarris, "are often imperative in effect; legislative, like judicial interpretation, being frequently deceptive, and establishing new laws under guise of expounding the old." (Dwarris on Statutes, 478.)

The general obligation of the Government, I may observe, to make compensation to the owner of private property, taken for permanent or temporary public use, is not denied or repudiated by this legislation. It merely withholds from the accounting officers authority to pass upon the class of claims mentioned, leaving them subject to the future disposition of Congress.

There can be no doubt that the present claim "originated," within the meaning of the statute, in the locality described and designated in the act. The boat was impressed within the territorial limits of Louisiana, while under enrollment and license at the port of New Orleans.

Being thus brought within all the terms of the statute

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of 1867, as construed by this office, the claim cannot be, in my opinion, lawfully adjusted and paid.

I am, sir, very respectfully,

Your obedient servant,

J. HUBLEY ASHTON,

Acting Attorney General.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

ATTACHMENT OF WITNESSES BY COURTS MARTIAL.

The 25th section of the act of March 3, 1863, authorizes compulsory process to be issued for the attendance of civilians as witnesses before courts martial, and such process may be directed to the officers charged with the executive business of those courts.

ATTORNEY GENERAL'S OFFICE,

October 2, 1868.

SIR: I have considered the point submitted in your letter of the 2d ultimo, arising upon the 25th section of the act of March 3, 1863, which confers upon the judge advocate of a court martial or court of inquiry "power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction, within the State, territory, or district where such military court shall be ordered to sit, may lawfully issue." (12 Stats., 745.)

Prior to the passage of this law, the attendance of civil witnesses before a court martial could not be enforced, though persons subject to military jurisdiction were bound to attend before such courts when properly summoned, and could always be compelled to do so. (9 Opinions, 312.)

The act just cited was passed to enable courts martial to compel the attendance, as witnesses, of persons not subject to military law, in the same manner, and to the same extent, as other courts exercising criminal jurisdiction may and can do. But the doubt is suggested, whether the object and operation of the law are not practically defeated

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by the omission of Congress to indicate the officer to whom compulsory process, issued conformably to the statute, may be directed for execution.

I think the doubt proceeds from a too narrow construction of the statute. The law expressly provides for the *issuing* of process in the nature of an attachment. Every such process is, and must be, directed to some officer for execution. A *subpœna* is simply a summons addressed to witnesses, and may be served upon them by any one who is interested in their attendance. An attachment, however, is directed to a sheriff or marshal, and commands him to have the party named therein before the court. (1 Tidd, 481; Archbold's Appendix, 35.) The process is not complete—it is no process at all—unless so directed. It seems to me, therefore, that the designation of some officer to execute the process must be involved in every attempt to exercise the authority conferred by the statute; that authority being to issue process to compel the attendance of witnesses *like* that employed and issued by civil courts for the same purpose. The express power is to issue a writ of attachment—a perfect, complete, and effective writ. No such process can exist unless directed to some one who is to obey its command and carry its object into effect.

I think, therefore, that, in issuing the process referred to in the statute, the judge advocate may indicate therein some officer who shall be charged with the duty of executing it.

A question of the same general nature as the present arose in regard to the authority of a civil court of the United States for a particular district to issue an attachment, directed to the marshal for that district, to compel obedience to a *subpœna* served upon a witness residing in another district. The act of March 2, 1793, provides, that the *subpœna* issued by a United States court in any district for a witness in a criminal case may "run into any other district."

It has always been held, that a circuit court for one district may attach a witness for contempt of its *subpœna* residing in another district and circuit.

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But the question directly arose before Mr. Justice Nelson, in regard to the authority of the court to direct its process of attachment, for the arrest of such a witness, to the marshal for the district in which the court sat. Now, it will be observed, that the act of September 24, 1789, makes it simply the duty of the marshal "to execute *throughout the district* all lawful precepts directed to him and issued under the authority of the United States." Mr. Justice Nelson held, notwithstanding, that the court might impose on the marshal the duty of going beyond the district to execute an attachment. The power of the court to issue the attachment was undoubted. This implied the authority to direct its execution by the marshal of the district in which the court was held. This decision of Mr. Justice Nelson is mentioned and approved by Attorney General Black, in an opinion reported in the 9th volume of the Opinions of the Attorneys General, p. 267.

For the reasons mentioned, and others that might be given, if necessary, I am of opinion that the act of March 3, 1863, authorizes compulsory process to be issued for the attendance, before courts martial, of witnesses not in the military service, and that such process may be directed to such officers as are, by the practice of the service, ordinarily charged with the duty of performing the executive business of those courts.

I am, sir, very respectfully,

Your obedient servant,

J. HUBLEY ASHTON,

Acting Attorney General.

Hon. J. M. SCHOFIELD,

Secretary of War.

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LEASE OF THE FORT LEAVENWORTH RESERVE.

The Leavenworth Coal Company, on payment of the purchase-money of the land embraced by their lease, will be entitled to a patent therefor in fee, and with it a grant also of the exclusive right of mining the coal underlying the rest of the military reservation, for the period limited by the terms of the lease authorized to be extended by the act of July 20, 1868.

ATTORNEY GENERAL'S OFFICE,
October 7, 1868.

SIR: I have the honor to acknowledge the receipt of your letter of the 28th ultimo, stating for my opinion certain questions arising upon the construction of the recent act of Congress relative to the Fort Leavenworth military reserve.

The case presented in your letter is this: Under instructions from the War Department, Captain S. Van Vleit, assistant quartermaster, on the 13th of November, 1860, entered into an agreement with Samuel Denman, Thomas Erving, Jr., and William H. Russell, leasing to them and their assigns, for the term of sixteen years from the date thereof, with "the preference in an extension," *twenty acres* of the Fort Leavenworth military reserve, to be used *for mining purposes*, together with the exclusive right of mining the coal underlying said military reserve; in consideration whereof, the latter undertook to incur the risk and expense of sinking a shaft, and, in case they were successful in finding coal of sufficient thickness for mining operations, to furnish the military fort there with the coal required for its consumption free of charge at the bank, and pay to the Government one quarter of one cent per bushel on the remainder raised, etc.

Upon the faith of this agreement, the lessees and their assigns, the Leavenworth Coal Company, prosecuted their mining operations under many difficulties, and, after expending their entire capital to the amount of $40,000, finally succeeded in striking deep coal beds. But, it being subsequently ascertained that the lease was without author-

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ity of law and invalid, the lessees could not thereafter proceed with their enterprise, and were threatened with the total loss of their money.

At this juncture, in view of the public benefit to be derived from the development of the coal strata of that region, the Legislature of Kansas, on the 18th of February, 1868, passed a joint resolution, requesting congressional action in the premises. Congress then passed the act of July 20, 1868, entitled, "An act to authorize the sale of twenty acres of land in the military reservation at Fort Leavenworth, Kansas," which, after reciting substantially the foregoing facts, enacts as follows:

"That the Leavenworth Coal Company, etc., shall have the right to purchase from the United States twenty acres of land lying in the military reserve at Fort Leavenworth, Kansas, and described as follows: [Here are given the boundaries of the tract.] The said Leavenworth Coal Company shall pay therefor the sum fixed by the United States district judges of the State of Kansas, the eastern district of Missouri, and of the northern district of Illinois, etc.; and said lease is hereby extended sixteen years from the passage of this act.

"SEC. 2. *And be it further enacted*, That, upon the payment of the purchase-money for the same, the Secretary of the Interior is hereby directed to issue to the said Leavenworth Coal Company and its successors and assigns a patent for the above-described lands, which patent shall also grant to the said company and its successors and assigns the exclusive right to mine for all coal underlying the lands now comprised in the military reserve aforesaid."

The district judges designated in the act to fix the sum to be paid for the twenty acres, the right to purchase which was thereby granted to the said company, have fixed the amount at $70 an acre, "for the fee-simple to said twenty acres of land; the sum so fixed being independent of all consideration of the value of the 'exclusive right to mine,' named in the 2d section of the act."

The Leavenworth Coal Company claim that, on payment

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of the $70 per acre, they become entitled to a patent, vesting in them a title in fee to said tract, and unconditionally granting to them the exclusive and perpetual right "to mine for all coal underlying the lands now comprised in the military reservation aforesaid."

With reference to the foregoing state of facts, the following questions are propounded:

"1. Is the said appraisement, inasmuch as it was made without considering the value of said mining right, such an appraisement as is contemplated by said act?

"2. Is the provision extending said lease binding upon said Leavenworth Coal Company without their consent?

"3. Is the said company entitled, on making said payment, to a patent in accordance with their claim; and, if not, what provisions should be incorporated in that instrument?"

Before considering these questions, it seems proper to inquire into the purpose or object of the legislation referred to. I think it quite manifest that this was to enable the company to reap all the advantages of the outlays they had previously made in their mining operations, and at the same time secure to the public the benefits to be derived from the development of the coal strata of that region. The object was to be accomplished by authorizing the extension or continuance of the lease for a term of sixteen years from the date of the act, which would thus place the lessees or their assigns in the same situation, relatively to the Government, from and after that date, which they had formerly occupied when the agreement was originally made in 1860; as, at the expiration of the sixteen years, they would continue, as before, to be entitled to "the preferance in an extension." There is no reason to suppose that Congress intended to confer upon them any other or greater mining privileges than what would be secured by the lease as thus extended. This lease, as has been shown, included the use of twenty acres, part of the reserve, as a place for carrying on the mining operations, with the exclusive right of mining the coal underlying the whole of

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the reservation; and, in consideration of such use and right, the lessees or their assigns were, among other things, to furnish the military post at Leavenworth with fuel free of charge, and pay a royalty to the Government of one-quarter of one cent per bushel on the remainder of the coal got out. But the act gives to the above-named company, the lessees' assigns, the further privilege of purchasing the said twenty acres at an amount to be fixed in the manner therein provided. Upon a purchase of the land by the company, inasmuch as this would also carry with it the coal lying thereunder, the terms of the lease, as respects the payment of a royalty and furnishing coal free of charge, could hardly be regarded, perhaps, as any longer extending thereto, though continuing in full vigor with reference to the rest of the reserve.

The right of mining coal underlying other portions of the reserve would not pass as an incident of such purchase; and I perceive nothing in the act which shows that Congress contemplated a cession of this right, in any event, beyond the period designated in the lease, or upon terms other than what are there expressed.

The 1st section of the act enables the company to purchase the twenty acres at a sum to be fixed, etc., without coupling therewith any mining privilege whatever, or declaring that the sum so fixed shall include the value thereof, but it expressly provides for an extension of a lease of such privilege for a definite period; while the 2d section enacts that, on payment of the purchase money for the same land, a patent shall issue therefor, which shall also grant the exclusive right to mine for all coal underlying the lands now comprised in said reserve. By the latter clause, I apprehend, nothing more was intended than that, in the event of the purchase of the land, the company should be confirmed in the exclusive right to mine the coal underlying the other lands of the reserve upon terms, conditions, and limitations corresponding with those contained in the lease. This construction seems to place it in harmony with the other provisions of the act, and is

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not inconsistent with the general object had in view by Congress.

1. As to the first question, then, it would appear that the appraisement made is such a one as is contemplated by the act, this not requiring the appraisers to fix the value of any thing besides the land itself.

2. In regard to the second question, there can be no doubt, if I understand the import of the inquiry, that, the original lease having been illegal, and, though authorized to be *extended*, the terms thereof having been altered in an essential particular, to wit, as to *time*, as thus modified at least it could only be made obligatory upon the company by their consent. The act simply authorizes the lease, which was before invalid, to be made valid and effective for sixteen years thereafter; but certainly, before it can have any binding force upon the lessees or their assigns, their consent thereto must be obtained.

3. The answer to the third question is indicated by the views above set forth. The company, on payment of the purchase money for the land, will be entitled to a patent therefor in fee, and with it a grant also of the exclusive right of mining the coal underlying the rest of the reserve for the period limited by the terms of the lease authorized to be extended as mentioned.

The grant of this privilege should accordingly embody provisions similar to those contained in the lease respecting the same privilege.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. O. H. BROWNING,

Secretary of the Interior.

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KINGSBURY'S CASE.

An act for the removal of the legal disabilities of a public officer is not retroactive, and does not entitle him to receive compensation for the period, previous to the act, during which he was unable to take the oath of office prescribed by the statute of July 2, 1862.

ATTORNEY GENERAL'S OFFICE,
October 9, 1868.

SIR: I have considered the question submitted in your letter of the 25th ultimo, touching the operation and effect of the act of July 20, 1868, "for the removal of certain disabilities from the persons therein named."

This question arises upon a claim made by Robert B. Kingsbury, late collector of internal revenue for the second district of Texas, who is one of the persons named in the act, for the salary and official emoluments of that office which accrued previously to the passage of the act. Mr. Kingsbury, by reason of participation in the rebellion, was unable to take, and did not take, I understand, the oath prescribed by the statute of July 2, 1862, and was, consequently, allowed no compensation as collector of internal revenue.

He claims that he is now entitled to be paid that compensation by operation of the act of 1868, which has removed all legal and political disabilities imposed upon him by the United States.

I am clearly of opinion that the ruling of the accounting officers, rejecting the claim, is correct. Whatever may be the effect of such legislation as the act of 1868 upon a claim for official compensation accruing subsequently to its passage, in the case of an officer unable, by reason of participation in the rebellion, to take the oath prescribed by the act of 1862, I deem it beyond doubt that it cannot properly be construed as retroactive, in the manner and to the extent contended by Mr. Kingsbury.

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I have the honor to return to you the papers enclosed in your letter of the 25th ultimo.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH McCULLOCH,

Secretary of the Treasury.

LENDENEG'S CASE.

A naval court-martial, upon conviction for an offence not capital under section 1, articles 7 and 8, of the act of July 17, 1862, may sentence to imprisonment at hard labor.

ATTORNEY GENERAL'S OFFICE,

October 9, 1868.

SIR: I have read and considered the opinion of the solicitor of your department in the case of George W. Lendeneg, upon the question which you submit to me in your communication of the 16th ultimo.

The question arises upon the construction of the 6th article of the 1st section of the "Act for the better government of the navy," approved July 17, 1862, which provides that, "in any case where a naval court-martial is authorized to adjudge the punishment of death, it may sentence the person convicted to imprisonment for life, or for a stated term at hard labor," &c. (12 Stats., 602.)

I am informed by your letter and the opinion of Solicitor Bolles, which you transmit to me, that the law officer of your department thinks that a court-martial, upon conviction of an offence not capital, under section 1, articles 7 and 8, of the act of July 17, 1862, may sentence to imprisonment at hard labor, and that the right to impose such sentence is not limited to cases of conviction of offences which may be punished capitally under the 3d article of the 1st section of that act.

You also inform me that "the construction given to this

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law by the department, from the time of the passage of the act, (1862,) has been, that punishment by imprisonment at hard labor in a penitentiary, under the sentence of a naval court-martial, can be inflicted only in the case expressed in the law—a 'case where a naval court-martial is authorized to adjudge the punishment of death.'"

I have carefully considered the question thus presented, and express my concurrence in the construction given to the act by the solicitor.

The reasoning of that officer is satisfactory to me, and I do not deem it necessary to repeat or enlarge upon it. To the authority cited by the solicitor, as affirming the general power of courts-martial to imprison at hard labor, in cases of discretionary punishment, I would add the opinion of Attorney General Black, in Crowell's case, (9 Opinions, 80,) and of Attorney General Bates, in Toombs' case, (10 Opinions, 158.)

I am, sir, very respectfully,
Your obedient servant,
WM. M. EVARTS.

Hon. GIDEON WELLES,
Secretary of the Navy.

CASE OF COMMERCIAL NAVIGATION COMPANY OF NEW YORK.

The contract intended to be authorized by the act of July 27, 1868, with the Commercial Navigation Company of New York, is for the exclusive transportation of all the European and foreign mails of the United States by it, in weekly or semi-weekly lines, and between either New York and Bremen, or between New York and Liverpool, as may be agreed, excluding all such transportation by other lines or upon more frequent days.

ATTORNEY GENERAL'S OFFICE,
October 10, 1868.

SIR: I have the honor to return to you the draft contract between the United States and the Commercial Navigation Company of New York, and also the draft declaration of trust between that company and the Hon. Edwin D. Morgan and others, submitted by you to my examination,

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If you should determine to enter into the contract with this company, which you are authorized by the 1st section of the act of July 27, 1868, in your discretion, to make, the form of the contract and of the proposed declaration of trust will need to be settled by a competent solicitor, to be employed for that purpose, under whose professional attention there can be no difficulty in adjusting the proper details of the proposed arrangements.

It falls within the province of my office, however, only to meet, by my opinion, a preliminary question which you have suggested you desire my advice upon, to aid you in determining whether the interests of the mail service will be promoted by a contract of the character authorized by the act of Congress.

This question, I understand to be, whether the contract authorized by the act of Congress to be made with the Commercial Navigation Company may be limited to giving the company the transportation of the mails on their proposed route for the compensation and on the conditions named in the act, by a weekly or semi-weekly line, without interference with the transportation of the mails by other lines sailing upon other and intermediate days of departure, or whether the contract to be made with this company by the authority of the act of Congress, if made at all, must embrace "*all* European and foreign mails" between the points named in the act, and to the exclusion of any participation in the entire mail service in question by lines whose vessels sail upon intermediate days.

Upon a careful examination of the whole act, I have come to the conclusion that a fair construction of its language, and a just appreciation of its purpose, concur in determining that the contract intended to be authorized with this company is for the exclusive transportation of all the European and foreign mails of the United States by it, in weekly or semi-weekly lines, and between either New York and Bremen, touching at Southampton, or between New York and Liverpool, touching at Queenstown, as might be agreed. Whatever form, then, within the alter-

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natives allowed by the 1st section of the act, you may decide upon for the mail service contemplated by the act, and shall accordingly contract for with this company, the contract when made will cover the whole transportation of "the European and foreign mails of the United States," and will exclude all such transportation by other lines, or upon other and more frequent days.

A clause in the 2d section of the act, introduced as a proviso, may seem to conflict with this construction of the principal and operative authority to contract conferred by the act. This clause reads as follows: "*Provided*, That no letters or mail matter shall be detained for the purpose of being sent by this line." I am, however, of opinion that this clause may be satisfied by giving it the meaning that no mail matter shall be detained by the failure of the vessels of this line to sail at the contract days and hours, and that it cannot be permitted to destroy the exclusive patronage of this line as the foreign mail carrier of the United States, which seems to me the manifest purpose and meaning of this act. The making up of the mails only for the vessels and the sailing days of this line cannot fairly be considered as a *detention* "for the purpose of being sent by this line," inasmuch as the policy of the act proceeds upon the ground that a weekly or semi-weekly mail service is adequate to the public exigencies, and, consequently, that no case of detention arises till this contracted service is disappointed by the failure of performance according to its terms. In such case the proviso comes into play, and the Government would be at liberty to substitute some other carrier for the moment to avoid the detention of mail matter "for the purpose of being sent by this line," which would otherwise occur.

If this be the true construction of the contract which you are authorized to make with the Commercial Navigation Company, it follows that the only discretion lodged with the Postmaster General by the terms of the act, which empower, but do not require, him to make the contract, is, whether the public interests of the European and foreign

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mail service will be promoted by a contract which will place this entire service in a weekly or semi-weekly and single line of steamers.

Upon your decision of this question in favor of such a contract, the form of the contract, with such specifications and protective guaranties of the public interests as the experience of the department has shown to be useful, can readily be supplied.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. A. W. RANDALL,
Postmaster General.

SPECIAL TAX ON FRUIT BRANDIES.

Distillers of brandy from apples, peaches, and grapes, exclusively, may be exempted, in the discretion of the Commissioner of Internal Revenue and the Secretary of the Interior, from the provision of the 59th section of the act of July 20, 1865, levying a special tax of four dollars a barrel upon distilled spirits.

ATTORNEY GENERAL'S OFFICE,
October 10, 1868.

SIR: The question submitted in your letter of the 8th instant is as to the power of the Commissioner of Internal Revenue and Secretary of the Treasury to exempt distillers of brandy from apples, peaches, and grapes, exclusively, from the payment of the tax imposed upon distillers by section 59 of the act of July 20, 1865, "imposing taxes on distilled spirits and tobacco, and for other purposes."

The solution of this question depends upon the construction and effect which should be given to that provision in the 2d section of the statute, which declares that "the tax on brandy from grapes shall be the same and no higher than that upon other distilled spirits; and the Commis-

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sioner of Internal Revenue is hereby authorized, with the approval of the Secretary of the Treasury, to exempt distillers of brandy from apples, peaches, or grapes, exclusively, from such other of the provisions of this act, relating to the manufacture of spirits, as in his judgment may seem expedient."

The principal and effective part of this clause is the last; and if the provision of the 59th section of the act, which imposes a special tax of $4 upon each barrel of distilled spirits, in the hands of the distiller, can properly be regarded as a provision of the statute "relating to the manufacture of spirits," in the sense and meaning of the law, then it is clear that exemption from such special tax may lawfully be granted to the class of distillers mentioned by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

It seems to me that the 59th section is a provision "relating to the manufacture of spirits" within the true sense and meaning of this statute. It will be observed that the words are, "such *other* provisions of this act relating to the manufacture of spirits."

This would clearly imply that some provision, "relating to the manufacture of spirits," had been previously made. Now, what can that provision be, unless it is the one contained in the 1st section, which levies a tax of fifty cents a gallon upon distilled spirits? We have it, then, that Congress regarded that provision of the 1st section as a provision of the act "relating to the manufacture of spirits." If that provision may be thus described, clearly the section imposing the special tax comes within the same designation.

The reading of the statute, then, is, that while distillers of brandy from grapes, etc., may not be exempted from the provision of the 1st section imposing the tax of fifty cents a gallon upon their brandy, they may be exempted, in the discretion of the officers named, from the provision of the 59th section, which levies the special tax of four dollars a barrel.

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I am clearly of opinion that the question submitted should be answered in the affirmative.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

THE CHOCTAW TRUST FUND.

The principal of the Choctaw trust fund, under article 13 of the treaty of June 22, 1865, cannot be drawn upon without special legislation of Congress.

ATTORNEY GENERAL'S OFFICE,

October 10, 1868.

SIR: I have considered the question presented in your letter of the 1st instant, touching the case of Messrs. Joseph G. Heald and Reuben Wright, Jr., viz: Whether the 50th article of the treaty of April 28, 1866, (14 Stats., 780, 781,) authorizes you to place upon the books of the Treasury, subject to the requisition of the Secretary of the Interior, $80,000 of the trust fund belonging to the Choctaw Indians under the 13th article of the treaty of June 22, 1855, (11 Stats., 614,) without further legislation by Congress.

I find, on examination, that, although Congress has from time to time made appropriations for meeting the interest annually accruing on this trust fund, no general provision has been made by that body placing the principal amount thereof to the credit of the fund on the books of the Treasury, or subjecting the same to be drawn therefrom. The absence of any such legislative provision must be regarded as decisive of the question submitted. I am accordingly of opinion that, until authorized by future legislation, you cannot lawfully apply any portion of the Choctaw trust

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fund to the payment of the said claim, under the stipulations of the 50th article of the treaty of 1866.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH McCULLOCH,
Secretary of the Treasury.

CLAIM OF THE FLORIDA RAILROAD COMPANY.

The Secretary of the Treasury has no power, on the application of the trustees of the Florida Railroad Company, to issue repayment drafts to the purchasers of lands of the company, sold for direct taxes, upon a claim that the lands have been duly redeemed.

ATTORNEY GENERAL'S OFFICE,
October 26, 1868.

SIR: I have had under consideration, as submitted by you in your letter of the 26th ultimo, the application of the trustees of the Florida Railroad Company for the issue of repayment drafts to the purchasers of certain lands in Fernandina, which were sold for direct taxes between December 27, 1864, and February 20, 1865, under a claim on the part of the trustees that the lands have been duly redeemed according to the provisions of the statutes in that behalf.

It is plain, from the exhibition of facts contained in your letter and the accompanying documents, that the Secretary of the Treasury cannot properly grant the application of the parties. The whole duty and authority of the Secretary in the premises are defined in the following clause of the 7th section of the act of March 3, 1865: "That in any case in which lands shall be redeemed after sale made by the board of commissioners, and after the money received by them on the sale of such lands has been paid into the Treasury, by the owner complying with all the provisions of the law relating to redemption necessary to be complied with on his part, the said board shall certify to the Secretary of the Treasury the fact that such lands have

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been redeemed, the amount of purchase money paid by the purchaser, and when the said purchase money was paid, together with such other circumstances as the Secretary, by general regulations or special instructions shall require, and the Secretary, on being satisfied that the lands have been duly redeemed, shall pay, by draft drawn on the Treasury of the United States, the said purchaser the principal and interest of the said purchase money; and the purchaser shall forthwith deliver possession to the owner so redeeming as aforesaid." (13 Stats., 502.)

Without determining or considering whether the property in question has been redeemed in fact or in law, it is a sufficient answer, in my opinion, to the present application, to say, that the Secretary of the Treasury has not been furnished with any certificate of the board of commissioners attesting and authenticating the redemption of the property, and that, in the absence of such a certificate as the statute requires and prescribes, the Secretary has no warrant of law for the withdrawal of the purchase money from the Treasury. The certificate of the board is made by the statute the official evidence of the fact of redemption, and this evidence the Secretary is required to demand and receive before he can lawfully grant such an application. It is a rule as old as the law itself, that when a statute limits a thing to be done in a particular form, it includes in itself a negative, viz, that it shall not be done otherwise, (Plowd., 206;) and this rule is especially to be observed when the thing required to be done is, as in this case, the payment of money from the public treasury. This view will dispose of the present application, and render it unnecessary that I should consider any other question that may be involved in the case.

I return herewith the documents enclosed with your communication.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

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McCARTY'S CASE.

A post chaplain in the army is an "officer" within the meaning of the 31st section of the act of March 3, 1863.

ATTORNEY GENERAL'S OFFICE,
October 26, 1868.

SIR: Your letter of the 2d instant presents substantially the following question for my opinion: Whether post chaplain John McCarty, of the United States army, is entitled to half pay and allowances while absent from his post with leave, from April 11, 1863, to October 2, 1863.

The 9th section of the act of July 17, 1862, (12 Stats., 595,) fixed the compensation of all army chaplains at "one hundred dollars per month and two rations a day while on duty;" which has been construed by your department, and perhaps correctly, to exclude them from any allowance of compensation when not on duty. But subsequently, by the 31st section of the act of March 3, 1863, (*ibid.*, 736,) it was enacted "that *any officer* absent from duty with leave, except for sickness or wounds, shall, during his absence, receive half the pay and allowances prescribed by law and no more," etc. So that the inquiry practically involved appears to be whether a post chaplain is an "officer" within the meaning of the latter provision.

On examination I find that post chaplains were originally introduced into the military service by virtue of the 18th section of the act of July 5, 1838, (5 Stats., 259,) which authorized "the officers composing the council of administration at any post from time to time to employ such person as they may think proper to officiate as chaplain, who shall also perform the duties of schoolmaster," etc.; and that this mode of creating them remained unchanged until, by the 7th section of the recent act of March 2, 1862, (14 Stats., 423,) all such as were then in service, as well as all

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who should thereafter be appointed, were required to be commissioned by the President.

Although prior to the last-mentioned act these chaplains did not fall under the denomination of commissioned officers, yet they appear to have been recognized by Congress as officers in the military service, and referred to as such by that body in terms placing them in many respects in the same category with commissioned officers. Thus, by the concluding clause of the act of February 11, 1847, (9 Stats., 124,) it is declared, that in certain contingencies "the *office* of such chaplain shall be deemed vacant, and the pay and emoluments thereof be stopped."

By the 1st section of the act of April 9, 1864, (13 Stats., 46,) they are made "subject to the same rules and regulations as *other officers* of the army;" and the same section also declares that under certain circumstances, among which is absence from duty with leave, "they shall be subject to no other diminution or loss of pay and allowances than *other officers* in the military service," etc. So, by the 30th section of the act of July 28, 1866, (14 Stats., 337,) when ordered from one field of duty to another, they are to be allowed "transportation at the same rate as other officers;" the term "officers" here used, as also where employed in the other citations just named, comprehending officers holding by commission. These instances have, it is true, for the most part, occurred subsequent to the date of the act of March 3, 1863; yet they all go to indicate that post chaplains were, whilst created in the manner provided by the act of July 5, 1838, recognized by the legislative branch of the Government as officers in the military service, and in many important particulars classed with commissioned officers.

Such having been the sense of Congress as respects their relations or condition in the army, I cannot avoid the conclusion, that these chaplains must be deemed to have been officers thereof at the period referred to, and as such within the provisions of the 31st section of the act of March 3,

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1863. It follows from this that Mr. McCarty is entitled to half pay and allowances while absent as mentioned.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS

Hon. J. M. SCHOFIELD,
Secretary of War.

OATH OF CLERKS IN EXECUTIVE DEPARTMENTS.

Clerks in the executive departments are officers, and required to take the oath prescribed by the act of July 2, 1862.

ATTORNEY GENERAL'S OFFICE,
November 7, 1868.

SIR: The only practical question, as I suppose, intended to be submitted for my opinion in your letter of the 24th ultimo, is, whether persons who are denominated clerks in the several executive departments are required to take the oath prescribed by the statute of July 2, 1862.

This depends upon the answer that may be given to the question, whether such clerks are officers under the Government of the United States. That they must be held to be within that designation is clear from the recent decision of the Supreme Court in the case of the United States *vs.* Hartwell, (6 Wallace, 393.) There, it was decided that a clerk in the office of the assistant treasurer at Boston, appointed by him, with the approbation of the Secretary of the Treasury, by authority of the general appropriation act of July 23, 1866, was a public officer. Mr. Justice Swayne, in delivering the opinion of the court, said: "An office is a public station or employment conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emolument, and duties.

"The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the ten-

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ure of his place. The duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

"A Government office is different from a Government contract. The latter, from its nature, is necessarily limited in its duration, and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

"The defendant was appointed by the head of a department, within the meaning of the constitutional provision upon the subject of the appointing power."

This opinion of the Supreme Court will enable you, perhaps, to discriminate between those persons connected with the executive departments who are public officers, and that other class of persons who may be described as employés of the Government.

The act of 1862, in so far as it embraces persons connected with those departments, applies exclusively to such as are within the legal designation of officers.

It does not embrace or include that class of persons in the service of the Government who may be called employés, as contradistinguished from officers of the United States.

The act of August 6, 1861, to which you have called my attention, includes employés as well as officers in the respective executive departments. Such employés are required to take the oath prescribed by the act, while they are not required to take the oath prescribed by the statute of July 2, 1862.

I am of opinion, therefore, that clerks in the several executive departments, appointed by the heads thereof pursuant to law, and whose compensation is fixed by law, are within the terms of the act of July 2, 1862, "to prescribe an oath of office, and for other purposes."

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH McCULLOCH,

Secretary of the Treasury.

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DISTILLATION.

1. The general purpose of the internal revenue law of July 20, 1868, so far as relates to distilled spirits, is to lay a tax upon the product of distillation, known as proof-spirits.
2. The act has made decisive and peremptory distinctions between the production of proof-spirits and the rectification or purification or the production of other forms of alcoholic compounds.
3. Any contrivance which should accomplish the production of alcohol or rectified spirits in a manner to subject such products to a single tax, as upon proof-spirits, would be presumptively in contravention of the law.
4. A true construction of the act of Congress does not require any distinction to be drawn between an arrangement of *stills* by which the process of "*doubling*" is carried on by passing the low-wines a *second* time through the *same* still, and passing these a second time through distillation in *another* still.
5. An arrangement by which a *tank* is interposed as a receptacle for the product of distillation, so far as the same has not reached the condition of proof-spirits, but still continues to be low-wines, with a view to carry it back for further distillation, is not a violation of the act.

ATTORNEY GENERAL'S OFFICE,
November 14, 1868.

SIR: I have carefully considered the inquiries which you put to me in your letter of the 26th of October ultimo, and the papers which you have laid before me bearing upon those inquiries. These questions are—

"1st. Whether the law of July 20, 1868, authorizes the distiller to convey from the outlet of the worm the product of his distillation to a still or doubler through which such product has *not* passed before reaching the worm, and authorizes him to redistill such product in such still or doubler?

"2d. Whether the distiller is authorized to convey the product of his distillation from the original still first to a tank and thence to another receptacle, whether called a doubler or second still, and to separate the product of the second distillation as it passes from the worm connected with such second still or receptacle, the proof-spirit being carried forward to the receiving cistern, and the low-wines,

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not back to the still or doubler, but to the above-mentioned tank?"

I am unable at present, as a substantial answer to your inquiries is deemed to be of immediate and pressing importance, to furnish as full a discussion of the statute in its details as I could wish.

I am satisfied that the general purpose of the law, so far as it relates to this topic of distilled spirits, is to lay a tax upon the product of distillation known in the act as proof-spirits.

All the subordinate provisions concerning the mode and apparatus of distillation, however important they may be, have really to do only with what may be called the police regulations of the act to secure the collection of the tax. I do not understand the act to propose any regulation or restriction upon the modes and contrivances which the experience or the interest of the distillers may suggest as useful in the production of proof-spirits, except in the sense and with the object of providing for the supervision and scrutiny of the process of distillation in aid of the Government's purpose to collect the tax. It is, however, very apparent, that the act has made decisive and peremptory distinctions between the production of proof-spirits and the rectification or purification or the production of other forms of alcoholic compounds. These latter provisions of the act have for their direct object the purpose of the Government to extract an independent tax from these additional operations of rectification or distillation applied to what has already been produced as proof-spirits by the original process of distillation. Any scheme, therefore, contrivance, or arrangement of the means and apparatus of distillation, which should seek to produce a final result of rectified spirits or of alcohol through a succession of simple distillations, and thus accomplish the production of alcohol or rectified spirits in a manner to subject these products only to a simple tax, as upon proof-spirits, would be presumptively in contravention of the law. But, this mischief and this infraction of the law being avoided, I am satisfied that

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any contrivance or arrangement of apparatus, by which the principal and definitely described product of proof-spirits, within the meaning of the law, is the result of the manufacture, is not objectionable, unless in the arrangement of the apparatus the positive provisions of the act in the nature of police regulations, as I have already characterized them, are in some point violated.

To come directly, then, to the practical inquiries which you put to me, I am of opinion that a true construction of the act does not require any distinction to be drawn between an arrangement of stills by which the process of "doubling" is carried on, literally so to speak, by passing the low-wines a second time through the same still and passing these low-wines a second time through distillation in another still. This process of "doubling" is not only in the general practice of the manufacture a necessary process, but it is one distinctly and by name recognized and allowed by the act itself. Presumptively, a law which has only for its purpose revenue from a manufactured product should not be held to interfere with the methods of manufacture which either economy or excellence in the product would dictate to the manufacturer.

It must then be, if at all, in some of the provisions of the act which regulate the arrangement of the apparatus of distillation, for the purpose of accessibility and security against fraudulent manufacture of proof-spirits, that the enactments must be found which are supposed to exclude a continuous redistillation, and permit only a redistillation through the very still which the first and incomplete distillation has employed. Such provisions, it is suggested, may be found in the 16th and 17th sections of the act, and, to give these sections this efficacy, stress is laid upon the phraseology, which requires that certain pipes shall be "so connected and constructed as to prevent the abstraction of spirits while passing from the outlet of a worm or condenser *back* to the still or doubler," in the 16th section, and that "every pipe for the conveyance of low-wines *back*

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into the still or doubler shall be painted blue," in the 17th section.

The whole force of the argument which should involve so serious and unsuitable a consequence of interference with the processes of manufacture dictated by economy or excellency in the product are these provisions, which are wholly in the nature of police establishment in aid of the scrutiny and security of the Government in collection of the tax. This is inconsistent, in my judgment, with sound principles of construction. And as this publicity and integrity of the apparatus may be adequately secured in due conformity to the positive regulations of these two sections by applying them to the pipes or modes by which the low-wines shall be carried back into distillation, although through a progressive process, to a second still, as well as by carrying them back mechanically into the same still which has been once used, I can see no evasion or frustration of any of the purposes of these two sections by permitting them to be applied so as to allow the further distillation of the low-wines anterior to the production of the proof-spirits, described by the act, from being carried on by distillers, by either recurrent or progressive distillation, as their interest or convenience may suggest.

Upon these considerations I am satisfied that "to convey from the outlet of the worm the product of his distillation to a still or doubler through which such product has *not* passed before reaching the worm" by a distiller is not a violation of the act of July 20, 1868, and that such distiller may by that method redistill low-wines of the first distillation to the production of proof-spirits, as described in the act. This answers your first inquiry.

Your second inquiry, as I understand it, introduces only the further consideration of whether a tank may be interposed as a receptacle between the worm of the first distillation and the doubler or second still, and whether the product of the second distillation, so far as the same has not reached the condition of proof-spirit, but still continues

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to be low-wines, may be carried back to this tank for further distillation.

The same reasons which have led me to answer your first inquiry as I have done permit no legal distinction to be taken, either because of this interposition of a tank, or by reason of this continued redistillation of the low-wines through a process of which the tank continues to form a part of the apparatus. Such an arrangement, therefore, would not, in my judgment, be a violation of the act.

I think it necessary only to add, that the whole scope and argument of this liberty and choice of method and apparatus are limited to the production of proof-spirits, and no inference must be drawn from this opinion that an engrafting or connection of the processes or the apparatus of rectifying proof-spirits, or of manufacturing other alcoholic compounds is justified by my conclusions, or by the the reasoning on which they are based.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

FEES OF CONSULS.

Consuls may retain $1,000 out of the aggregate of moneys received from consular agencies or vice consulates.

ATTORNEY GENERAL'S OFFICE,
November 21, 1868.

SIR: Your letter of the 26th ultimo submits for my opinion this question: May a consul retain for his own use $1,000 per annum out of the aggregate surplus which may result from his agencies, over and above the $1,000 for expenses? Or, must all above the agent's compensation and allowances for expenses be paid into the Treasury?

After an examination of the statutes relating to the sub-

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ject, and to which you have directed my attention, viz, the acts of August 18, 1856, and of March 30, 1868, I arrive at the conclusion that, under the provisions of the act last cited, a consul is authorized to retain $1,000 out of the aggregate of moneys annually received by him from consular agencies or vice consulates, but that all funds so received by him in excess of that amount should be accounted for, and paid into the Treasury of the United States.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. WM. H. SEWARD,
Secretary of State.

SIMES' CASE.

A sentence of permanent disability from dealing with the Government in matters of naval supplies, in the case of a contractor convicted by a court-martial, is unwarranted by the usage of the service, and is therefore illegal.

ATTORNEY GENERAL'S OFFICE,
November 24, 1868.

SIR: In your letter of the 22d ultimo you request my opinion as to the legality of so much of the sentence pronounced upon William F. Simes, by a naval general court-martial, as declares that he "be hereafter excluded from any further deliveries, either on contract or open purchase for naval supplies."

It appears that in the spring of 1865 Simes was tried and convicted by the court-martial referred to, upon charges of fraud and willful neglect of duty as a contractor, under the 16th section of the act of July 17, 1862, (12 Stats., 596,) which provides, that any contractor for army or navy supplies shall be deemed and taken as part of the land or naval forces of the United States, and be subject to the rules and regulations for the government thereof, and that

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whenever found guilty by a court-martial of either of the charges aforesaid, he "shall be punished by fine, imprisonment, or such other punishment as the court-martial shall adjudge."

The court is here given a discretionary power of inflicting upon conviction such other punishment, besides fine and imprisonment, as it shall deem the offender to deserve; but this discretion is to be understood as controlled by the custom of the service, and limited to the imposition of that kind of punishment only which has become usual. (10 Opinions, 159, 160.) A sentence of incapacity or disability does not seem to fall within the range of discretionary punishments allowable by the usage of the service.

De Hart, in his Treatise on Courts-Martial, 194, observes that incapacity to hold any office in the service is only admissible as a punishment in cases where it is specially mentioned by law. So in the British service I find that the same rule obtains, and that it is not competent to a court-martial to impose such a sentence, except in cases specially declared to be so punishable. (Simmons' Practice, Courts-Martial, 377.)

Other works have been consulted without finding any authority or precedent mentioned therein supporting a contrary view. Thus it may be accepted as an established rule, that a sentence of disability is not in accordance with the custom of the service, except where it is expressly authorized by law.

Accordingly, I am of opinion that the clause in the sentence pronounced upon Simes, as quoted above, which in effect places him under a permanent disability in regard to dealing with the Government in the matter of naval supplies, being unwarranted by the usage of the service, is clearly illegal.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. GIDDEON WELLES,

Secretary of the Navy.

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THE EIGHT-HOUR LAW.

The act of June 25, 1868, constituting eight hours a day's work for all Government laborers, does not absolutely require that employés of the Government must receive as high wages for their eight hours' labor as similar industry in private employment receives for a day's labor of ten or twelve hours; but it simply requires that the same *worth* of labor shall be compensated in the public employment at the same rate of wages that it receives in private employment.

ATTORNEY GENERAL'S OFFICE,
November 25, 1868.

SIR: The President recently referred to the Attorney General a communication addressed to him by A. D. Brock and two others, styling themselves a committee of printers employed in the Government Printing Office, and requesting an opinion as to the proper construction of the law mentioned therein.

That law I find to be the act of June 25, 1868, entitled "An act constituting eight hours a day's work for all laborers, workmen, and mechanics employed by or on behalf of the Government of the United States," which reads as follows: "That eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may be hereafter employed, by or in behalf of the Government of the United States, and that all acts and parts of acts inconsistent with this act be, and the same are hereby, repealed."

The communication of the committee is to the following effect: That the committee were surprised to learn that the Secretary of War had been led to construe the above law, in a recent order promulgated by him, so as to reduce the pay of employés in the War Department to correspond with the reduction of hours, he having declared in said order that, "in his opinion, it was never the intention of Congress to give ten hours' pay for eight hours' work;" that they thereupon visited that officer, in the hope that, by laying before him certain facts bearing upon the intention of Congress in enacting the law, they might "induce

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him to revoke his order, and accept the construction which has hitherto been put upon the law by its enemies as well as by its friends," but failed to satisfy the Secretary that he was in error; and that, firmly convinced that the construction of the law given by him is erroneous, they, although gratefully enjoying the unquestioned benefits "of that wise and liberal measure," ask the President, *in behalf of the workingmen of the country*, "to instruct the Attorney General to give an opinion upon the true construction of the eight-hour law, for the guidance of all heads of departments in that behalf."

It will be seen that the printers engaged in the Government Printing Office are not directly affected by the order of the Secretary of War, and suffer, it would seem, no diminution in their pay in consequence of the reduction of their hours of labor. The order affects only the employés of the War Department, among whom they are not included. Subsequently the President referred to this office a communication addressed to him by a committee of the Workingmen's Assembly of the District of Columbia, asking a rescission of an alleged order of the Secretary of War directing that persons engaged on works in which the War Department is interested shall receive pay "in proportion to the hours they labor," or that the opinion of the Attorney General "may be taken as to the true meaning of the law of Congress (above cited) as deducible from the statute when collated with the official record of the debate in the Senate on the 24th of June, 1868."

The order of the Secretary of War referred to, I presume, is one of July 28, 1868, approving an endorsement of General A. B. Dyer, of the Ordnance bureau, upon a communication of General T. J. Rodman, of the Rock Island Arsenal, dated July 16, 1868, to the following effect:

"ORDNANCE OFFICE,

July 25, 1868.

"The practice of this department has been to allow mechanics and other hired workmen the same wages as are paid by private establishments in the vicinity for the

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same kind and grade of labor, and it would seem to be proper to continue this rule.

"If the mechanics and laborers in the vicinity of Rock Island receive from private establishments less wages per hour than are now paid at Rock Island Arsenal, the wages at that arsenal should be correspondingly reduced; but if they desire to work ten hours each calendar day, it should be allowed, and they should be paid for one and a quarter days, instead of one day, as heretofore.

"A. B. DYER,

"*Bt. Maj. Gen., Chief of Ordnance.*"

It may be collected from the papers referred to this office that the question on which the Attorney General's opinion is desired, is, whether the act of June 25, 1868, reducing the number of hours constituting a day's work, was intended to work a corresponding reduction in the compensation for a day's work.

There is nothing in the language of the act to indicate such intention, nor does this construction seem at all consistent with the aim and purpose of the law, which were reformatory in their character, having in view the promotion of the physical, intellectual, and moral welfare of those who are engaged in manual labor, and of the general interests of society. The theory appears to have been that the laboring man or mechanic, by means of the increased physical strength and vigor acquired through a reduction in his hours of toil, would be enabled to accomplish daily as much upon an average in eight hours' *constant* labor as he formerly did in ten or even a longer period, while at the same time he would enjoy a longer season for mental and moral improvement. Whether this is sound in principle is not here the question; that it constituted the main ground upon which the act proceeded, a reference to the debates in Congress on its passage will clearly show.

Acting upon this theory, then, which assumes that the Government will receive the same daily equivalent from the workingman under the new regulation as under the old, the legislature could not have contemplated a neces-

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sary reduction in his daily compensation. The plain import of the law is, that a laborer, workman, or mechanic, in the employ of the Government, whether hired by the day, week, or month, shall only be required to work eight hours a day to earn his daily, weekly, or monthly wages, whatever these may be. The rate of his compensation is left to the control of the same agencies and laws which governed it before; and the statutory provisions on this subject are few and very limited in their operation. The 8th section of the act of December 21, 1861, (12 Stats., 330,) and the amendatory act of July 16, 1862, (*ibid.*, 587,) comprise all I have been able to find, and these are confined to employés in the Government navy-yards.

The former act provided that the hours of labor in the public navy-yards should be the same as those in the nearest private ship-yards, and that the wages of all employés in such navy-yards should approximate as nearly as possible; the average prices paid employés of the same grade in the nearest private ship-yards or work-shops to be determined by the commandant of the navy-yard. This was amended by the latter act, which provides, "that the hours of labor and the rate of wages of the employés in the navy-yards shall conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity of the respective yards, to be determined by the commandants of the navy-yards, subject to the approval and revision of the Secretary of the Navy."

The effect of the recent act of June 25, 1868, is to repeal so much of these statutes as relates to the regulation of the hours of labor, leaving the provisions relating to wages to stand as they were before; and it has necessarily a corresponding effect where, in other departments of the public service, the wages of Government employés are regulated by similar modes and standards.

But while I do not find in the act any indication that the reduction of the hours of a day's labor should of itself work a proportionate or any reduction of wages, and while

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the debate on the bill in the Senate exhibits a consideration of this proposed consequence and a rejection of it, I must also say, that I find nothing in the act that requires an absolute rule that employés of the Government embraced within the act must receive as high wages for their day's labor of eight hours as similar industry in private employments receives for a day's labor of ten or twelve hours. The act is wholly silent on the subject of wages, fixing only the length of a day's labor.

The *equality* between the wages of the employés of the Government and of similar industry in private employment (which is so manifestly just and expedient as to have been provided for by law in regard to employés of the Navy Department and by departmental regulation in the War Department) is a matter of substance and not of form.

This *equality* requires that the same *worth* of labor should be compensated in the public employment at the same rates of wages that it receives in private employment. If, then, it is found that the theory upon which the act in question was proposed and commended to the favor of Congress, to wit, that as much worth of labor would be acquired to the Government as by more hours of daily labor in the long run is justified by experience, then this rule of equality between public and private employment requires that the eight-hour day-labor of the Government should be compensated by as high wages as the ten-hour day labor in private employment receives. If, on the other hand, the eight-hour day labor of the Government is found to produce less worth of labor to the Government than ten-hour day labor produces to private employers, the principle of equality of compensation would be surrendered if equal wages were paid for unequal labor. If this disparity in the worth of the two different measures of labor were found to exist, then the workmen in private employment would justly claim that if the Government paid certain wages for eight-hours' labor they should receive higher wages for ten-hours' labor.

This increase of wages for ten-hour labor being thus

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established in private employments, the employés of the Government would demand this new measure of ten hours labor, based upon its being worth more than eight-hour labor, to be applied to their eight-hour labor, and thus in turn each system would be encouraged to rise upon the demands of the other. That the essential element of this rule of equality is that the same *worth* of labor should receive the same wages in Government as in private employment may be illustrated by a not improbable condition of wages, while this theory of fewer hours producing equal amounts of labor with longer time of work is being tested by experience. Suppose that there should be a divided practice in private employment, by which ten-hour labor should receive certain wages, and eight-hour labor less wages. Are the Government eight-hour laborers to receive, under the statutes requiring, or the departmental regulations prescribing, equality of wages between public and private employments, the private wages for eight-hour or those for ten-hour labor? Manifestly the Government employés, in the supposed case, would find their necessary measure of equality in the private wages of the eight-hour labor, and not in the larger wages of the ten-hour labor.

The conclusion, then, to which I come is, that the recent act does not require that the wages of the shortened day of Government labor should be reduced in the proportion of the hours of labor, and that the act as little requires that the wages of this shortened day should be as large as the wages of the longer day of private employment. In this silence of the act itself on the measure of wages, while it speaks only of the hours of labor, the departments are left to the guidance of the rule of equality of compensation for equal worth of labor in Government and in private employment. It may be that this equality of worth will require that the eight-hour labor for the Government should be compensated as highly as the ten-hour labor in private employment. It may be that the wages in the two employments should be in the proportion of the different hours of labor. And finally it may be that the true adjustment

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of disparity of value between the two systems of labor may lie between these two rules.

I am disposed to think that no better solution of the questions raised by the passage of an act prescribing the length of a Government day of labor, while the private employments are free from any restriction in this respect, must be found in the substance of the rule of equality between Government and private wages, which is manifestly wise and just. Whatever difficulty there may be in applying this rule is intrinsic in the subject, and can only be met by experience.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

The PRESIDENT.

COMPROMISE OF INTERNAL REVENUE SUITS.

Where a suit under the internal revenue laws is agreed to be dismissed upon payment of costs by the claimant, and entry of certificate of probable cause of seizure, the same is an agreement for a compromise of the case, and cannot take effect without the approval of the Commissioner of Internal Revenue, the Secretary of the Treasury, and the Attorney General.

ATTORNEY GENERAL'S OFFICE,

November 28, 1868.

SIR: In your letter of the 13th instant you propounded to me, at the suggestion of the Commissioner of Internal Revenue, a question raised in a recent case under the internal revenue laws, by the United States district judge for Kentucky, touching the construction of that provision of the 102d section of the act of July 20, 1868, which prohibits the compromise of any internal revenue case, after a suit or proceeding in court has been commenced, without the recommendation of the Attorney General.

The case, as reported to you by the Commissioner of Internal Revenue, is this: "On or about the 5th of August last, Collector Speed, 5th district Kentucky, seized twenty-

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five barrels of distilled spirits. The cause was alleged irregularity in the branding. Information was filed, but subsequently evidence explanatory of the irregularity was produced so satisfactory in its nature as to induce the assessor, collector, and the United States attorney to recommend a release of the spirits upon payment of costs and entry of certificate of probable cause. Accordingly, on the 1st of October, I authorized a release upon those terms. I received in reply a letter from Collector Speed, saying that the United States attorney informs him that 'the court declines to dismiss proceedings, as, under section 102, act of July 20, 1868, the recommendation of the Attorney General is necessary.'"

The opinion of Judge Ballard on this point you desire me to consider, and to say whether I concur in or dissent from it.

Upon careful consideration of the terms of the act, in the light of its manifest purpose and policy, I am of opinion that the agreement or understanding in virtue of which it was proposed to dispose of the case in the manner stated was a compromise within the intent and meaning of the 102d section of the statute. The claimants agreed, in consideration of a dismissal of the suit without judicial contestation, to pay the costs, and to release the officers of the Government from liability on account of the seizure.

The proposed arrangement contemplated an adjustment of the case by mutual concessions, without resort to the judicial action of the court, and was clearly a proposal for a compromise of the proceeding, which could not lawfully be made or take effect without the concurrence of the three officers named in the statute: the Commissioner of Internal Revenue, Secretary of the Treasury, and the Attorney General.

The actual case does not call, perhaps, for any expression of opinion on the point, whether the Commissioner of Internal Revenue may direct the unconditional dismissal of a suit under the internal revenue laws, without the approbation and recommendation of the other officers

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mentioned in the statute; though I incline strongly to the view that Congress intended to require that, before any suit under the internal revenue laws should be disposed of by dismissal without judicial contestation, the judgments of the three officers mentioned should concur in favor of the propriety of such action on the part of the executive department. This question does not actually arise, as I have said, in the case before Judge Ballard, and a definite opinion need not now be expressed by me upon it.

I am, sir, very respectfully,
Your obedient servant,

WM. M. EVARTS.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

DETENTION OF LOTTERY CIRCULARS IN THE MAILS.

The statute of July 27, 1868, prohibiting the mailing of letters or circulars concerning lotteries, cannot be safely executed by postmasters in all cases without additional legislation.

ATTORNEY GENERAL'S OFFICE,
December 7, 1868.

SIR: I am in receipt of your letter of the 3d instant, directing my attention to your previous communication of the 2d ultimo, in which you propound certain inquiries touching the effect and operation of the statute of July 27, 1868, prohibiting the mailing of letters or circulars concerning lotteries and similar enterprises, and the authority of postmasters under the provison of that statute.

I have had the subject of those inquiries under serious consideration, but have found it quite impossible, in the present state of the postal laws, to develop or define any rules which would furnish safe guidance to the postmasters of the country in attempting to enforce the prohibition of the statute in the various cases that may arise of supposed infringement of its provisions.

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Detention of Lottery Circulars in the Mails.

The acts of Congress prescribe heavy penalties for the unlawful detention or delay, by persons employed in the postal service, of letters intended to be conveyed in the mails or delivered from any post offices. These acts are, of course, unrepealed and unaffected by the statute of 1868. While it may be lawful for a postmaster to detain and refuse to deliver a letter or circular within the prohibition of that statute, it is unlawful for him to detain or delay any letter which is not, in fact, within that prohibition, unless otherwise subject to detention; and he would be liable to indictment, and to a private action by the party aggrieved, for refusing to deliver a letter, otherwise competent to pass through the mails, which it could be shown was not within the description of matter rendered unmailable by the statute. The officer may have acted in perfect good faith in the particular case; he may have had reasonable ground to believe, under all the circumstances brought to his attention, that the letter detained was within the prohibition of the statute; and yet I cannot say, in the present state of the law, that such a plea would be a good defence, either to a public prosecution, or to a private suit, by the person aggrieved.

The case of Teal *vs.* Felton, decided by the Supreme Court, and reported in 12 Howard, 284, was an action of trover, to recover from a postmaster the value of a newspaper received by him, which he refused to deliver to the person to whom it was addressed. The postmaster had charged the newspaper with letter postage, on account of a letter or initial upon the wrapper of it distinct from the direction. The plaintiff refused to pay anything but the lawful postage of a newspaper. This the defendant declined to receive, and the plaintiff brought his action. The Supreme Court held that the act of Congress alone could furnish any justification, and, if that afforded none, that the officer was liable, although he may have acted in good faith under the instructions of the Postmaster General. Mr. Justice Wayne, in delivering the opinion of the court, said: "It is the law which gives the justification, and noth-

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ing less than the law can give irresponsibility to the officer, although he may be acting in good faith under the instructions of his superior of the department to which he belongs. Here the instructions exceed the law, as marks and signs of themselves, without some knowledge of their meaning and the intention in the use of them, are neither memoranda nor writings."

We have, then, on the one hand, a statute which may be regarded as authorizing the detention at an office of delivery of letters concerning lotteries and similar enterprises, and, on the other hand, a stringent law, which imposes severe penalties upon a postmaster who may detain letters, otherwise innocent, which are not of the character denounced by the statute of 1868.

The inconvenience of this situation can be remedied only by additional legislation. It is competent for Congress to confer any further authority upon postmasters that it may deem necessary to carry out the policy of the act of 1868. When Congress has thought it proper to authorize the removal of wrappers and envelopes from mailed matter for the purpose of securing the payment of the proper postage, it has not hesitated to confer that authority upon postmasters. The act of March 3, 1863, section 40, for instance, expressly authorizes them to remove the envelopes or wrappers from printed or other matter not charged with letter postage or lawfully franked, for the purpose of ascertaining whether there is upon or connected with such printed matter anything which requires a higher rate of postage. Congress has power to confer similar authority in the case of mailed matter which may be supposed to be within the prohibition of the act of 1868; but whether the interests of the community require such, or any other exercise of legislative power, relative to the subject matter, it must be for Congress to determine.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. A. W. Randall,
Postmaster General.

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SANDFORD'S CLAIM.

The claim of James T. Sandford for compensation for the use of the steamer "Kennebec," under charter to the Government, should be allowed, upon the facts as reported by the Second Comptroller.

ATTORNEY GENERAL'S OFFICE,
December 9, 1868.

SIR: I am in receipt of your letter of the 3d instant, asking my opinion upon the question involved in the claim of James T. Sandford, for compensation for the use of the steamer "Kennebec" by the Government, under a charter-party entered into on the 3d of March, 1862, by Mr. Sandford and Captain H. C. Hodges, assistant quartermaster, on behalf of the United States.

Upon the facts of the case stated in the letter of the Second Comptroller, which you have transmitted to me, I am clearly of opinion that Mr. Sandford has a valid claim against the Government for the amount he demands.

The authority of Captain H. C. Hodges to enter into the contract for the hire of this vessel is not denied, nor is it doubted that it was made in good faith, and without fraud, or suspicion of fraud. It was competent for the Government and the claimant to rescind the contract at any time by their mutual agreement, or the Government might have returned the vessel before the expiration of the period during which she actually remained in the public service; and if either event had occurred, the parties might have entered into any new contract fixing a lower or different rate of compensation. But neither one nor the other thing was done. The contract was not rescinded by agreement, and the vessel was not returned to the owner till September 8, 1863. During the whole period, from the time of the execution of the charter to the date of her discharge, she was in the service of the Government upon the terms and conditions provided in the charter-party.

It seems to be supposed that the instructions issued to the several quartermasters by the Quartermaster General,

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on March 31, 1863, directing those officers to employ a from of contract different from the one entered into in respect to this vessel, have some application to the contract under consideration. But, manifestly, this idea proceeds from an incorrect view of the nature and obligations of a contract legally and validly made by the Government with a citizen. It was not in the power of the officers concerned with the chartering of vessels, by their arbitrary will, to impose upon the owner the terms and conditions of any different form of charter-party to which he had never assented. If, as I have said, the parties had agreed to rescind the charter-party of March 3, 1862, and they had entered into such a contract as that suggested in the circular instructions of the Quartermaster General, with a modified rate of compensation, the rights and obligations of the parties would have been different; or, if the Government had returned the vessel to the possession of the owner, and he had agreed to any such modified charter as has been mentioned, the Government would have been bound to pay thereafter only in accordance with the stipulations of that charter.

But it appears that no such modification or change of the original charter was ever made by the agreement of the parties, and the Government is of course obliged to fulfill the terms of that contract.

In giving this opinion, I take for the facts of the case the statement submitted by the Second Comptroller, and assume that the charter-party under which the claim is made was entered into by valid authority of the Government.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

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COMPROMISE OF FORFEITED RECOGNIZANCE.

The Secretary of the Treasury has power, under the authority of the 10th section of the act of March 3, 1863, to compromise a claim against the surety in a forfeited recognizance for the appearance of a person charged with crime.

ATTORNEY GENERAL'S OFFICE,
December 14, 1868.

SIR: I am in receipt of your letter of the 11th instant referring to a compromise stated to have been made by the Secretary of the Treasury under the act of March 3, 1863, section 10, of a claim in favor of the United States against the surety in a forfeited recognizance given for the appearance in the United States district court for the northern district of Illinois of a person charged with the offence of robbing the mail. You desire my opinion on the question, whether the statute referred to was intended to meet such a case as the one just mentioned.

The statute was not intended to vest in the Secretary of the Treasury any authority, or impose upon him any duty touching the administration of the criminal laws of the United States. Its purpose simply was to enable the Government to realize the largest amounts from money claims which might be of doubtful recovery or enforcement, and to accomplish this object the Secretary of the Treasury was empowered to compromise such claims upon the recommendation of the counsel having charge of them and of the Solicitor of the Treasury. This power is strictly, therefore, a fiscal one, and is to be exercised in each case upon fiscal considerations alone.

The claim in question was upon a forfeited recognizance, given to enforce the appearance of a person charged with crime to answer, I presume, an indictment therefor in a court of the United States. The question as to the amount of bail proper to be required in the case under its circumstances was decided by the commissioner or court before whom the bail was entered, and that decision was conclu-

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sive and final upon the point. But if it was made to appear to the Secretary of the Treasury that the United States could not realize by judgment and execution the full amount of the debt, by reason of the insolvency of the surety or other impediment, the Secretary was authorized, upon the concurring recommendations of the district attorney and the Solicitor of the Treasury to effect a compromise of the claim upon the best terms that could be obtained.

Within the limitations and upon the conditions just stated, a claim of this character is subject to compromise under the authority conferred upon the Secretary of the Treasury by the 10th section of the act of March 3, 1863.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. A. W. RANDALL,
Postmaster General.

POWER OF THE ATTORNEY GENERAL.

The Attorney General has no power to give opinions concerning any matters pending in Congress upon request of either of the Houses or of any committee.

ATTORNEY GENERAL'S OFFICE,
January 20, 1869.

SIR: I have had the honor to receive your letter of the 14th instant, in which you state that you are directed by the Committee on Naval Affairs (of the Senate) to transmit to me the "joint resolution" enclosed and the accompanying papers, and to request me to examine the case as presented, and to furnish the committee with my opinion upon the rights of the parties, and as to whether the Government, by the passage of said joint resolution, would be made pecuniarily or equitably liable.

I have delayed making an answer to these requests, which, personally, it would give me great pleasure to comply with to the best of my ability, until I should have looked into

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the question of my official authority or right to impart advice, in any form, to the Houses of Congress or their committees.

It has been uniformly considered that the powers and duties of the Attorney General were limited and defined by the statutes passed by Congress on the subject, and that any exercise of official action beyond the statutory authority conferred upon him, was an unwarrantable assumption on his part. It is true that when his action should have been taken in the supposed public interests, and by the desire of one of the Houses of Congress or its committees, the Attorney General would be personally excused from the blame of voluntary excess of rightful authority; but, nevertheless, it has been distinctly held by my distinguished predecessors, Mr. Wirt, Mr. Taney, Mr. Crittenden, and Mr. Bates, that it was not competent for the Attorney General to give opinions concerning any matters pending in Congress upon the request of either of the Houses or of any committee. (1 Opinions, 335; 2 *ib.*, 499; 4 *ib.*, 561; 10 *ib.*, 164.)

I should be very glad, in this instance, and at all times, to give any aid to any of the committees of Congress which they should do me the honor to think in my power, but concurring, as I do, in these opinions of my predecessors, I am sure you will excuse me from undertaking, upon motives however excellent, a service beyond my official authority.

I beg leave, therefore, respectfully to return the enclosed papers to the committee, and to refer to the opinions of my learned predecessors, above cited, for a full exposition of the grounds upon which the Attorney General is compelled to surrender his personal wishes to accede to such requests from the Houses or committees of Congress to the restrictions upon his official duty.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. JAMES W. GRIMES,

Chairman Committee on Naval Affairs, Senate.

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AUTHORITY OF THE ATTORNEY GENERAL.

It is not within the official authority of the Attorney General to impart advice in any form to either House of Congress or its committees respecting any matter of legislation.

ATTORNEY GENERAL'S OFFICE,
January 20, 1869.

SIR: I have had the honor to receive your letter of the 14th instant, enclosing Senate bill No. 131, "To authorize the New York, Newfoundland, and London Telegraph Company to land its submarine cable upon the shore of the United States," which, as your letter states, has been referred to me by the Committee on Commerce (of the Senate,) requesting my views relative to the necessity and propriety of the legislation proposed by the bill.

It would, in this instance, and at all times, give me great pleasure to furnish to any committee of Congress any aid that they should do me the honor to think was in my power, were I not satisfied, upon the opinions of my learned predecessors and upon my own consideration of the subject, that it is not within the official authority of the Attorney General to impart advice in any form to the Houses of Congress or their committees respecting any matter of legislation.

I have just had occasion to reply to the Hon. Mr. Grimes upon a similar application to me from the Committee on Naval Affairs (of the Senate,) and in returning the bill enclosed with your letter, I beg leave, very respectfully, to ask your kind attention to a copy of my letter to Mr. Grimes, as exhibiting more fully the grounds of the rule on this subject which has been acted upon by my predecessors.

I am, sir, very respectfully,
Your obedient servant,
WM. M. EVARTS.

Hon. Z. CHANDLER,
Chairman of the Committee on Commerce, Senate.

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EFFECT OF PRESIDENT'S PARDON

A pardon by the President will restore an officer whose rank has been reduced by sentence of a court-martial to his former relative rank according to the date of his commission.

ATTORNEY GENERAL'S OFFICE,
January 22, 1869.

SIR: The question submitted for my opinion by your direction under date of the 30th ultimo I understand to be this: Whether, where a captain in the army has been sentenced by a court-martial to reduction in rank by having his name placed lower down on the list of officers of the same grade, a remission of the penalty by the President, in the exercise of the pardoning power, will have the effect of restoring the officer to his former relative rank and position on the roll?

By the rules prescribed for the government of the military service, the relative rank of officers of the same grade in the army is ascertained and fixed by date of commission or appointment, (Army Reg., art. 2;) and as all vacancies to the rank of colonel are required to be filled by promotion according to seniority, cases of disability or incompetency excepted, (*ibid.*, art. 4,) the order in which officers under that rank stand in their several grades on the army rolls is important, not only in connection with points of precedency and command, but as determining their respective rights to advancement upon the happening of vacancies in grades above their own, and it is hence called the line of promotion.

Regularly, then, the law of the service assigns to each officer a rank in his grade and in the line of promotion corresponding with the date of his commission, and when this order or disposition is interrupted, as in the case under consideration, through the intervention of a court-martial proceeding, it can only remain so by the continuing operation of the penalty imposed, which may be said to act as a punishment from day to day, so long as the officer affected is excluded from the enjoyment of his previous status.

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Taking this view of the nature of such a penalty, I am led to the conclusion that a remission of the same by pardon necessarily carries with it the restoration of the officer to his pre-existing capacity and right, under the law of the service, to occupy a place on the list of his grade appropriate to the date of his commission—the officer losing, of course, such opportunities for promotion as may in the meantime have occurred.

The case of an officer who has been thus reduced in rank differs essentially from that of an officer who has been dismissed from service by sentence of a military court. After the latter is duly confirmed and executed, the dismissed officer cannot be reinstated by means of a pardon, or in any other manner than by a new appointment and confirmation by the Senate. (10 Opinions, 22.) This is because the execution of the judgment in effect abrogates the officer's commission, and entirely dissolves his connection with the service, placing him in exactly the same situation relatively thereto which he occupied previous to his original appointment; and, moreover, a pardon, it has been said, does not operate to restore an office forfeited. (4 Wall., 381.)

But no such consequences ensue upon execution of sentence in the former case. The officer's relations to the service are not thereby dissolved, so that when released from the penalty inflicted there is no occasion for the exercise of the appointing power to replace him. Already clothed with a commission, he is clearly entitled to the rank which it bestows.

In connection with this matter, I have examined the opinions of several of my predecessors, to which my attention has been directed, respecting the restoration of officers from the reserved to the active list, their transfer from one regiment to another, and kindred subjects; (see 2 Opinions, 355; 5 *ibid.*, 259; 8 *ibid.*, 223; 9 *ibid.*, 20; 10 *ibid.*, 107,) which have been thought to throw some light upon the question presented, but in none of them have I been able to dis-

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cover anything that supports a different conclusion from the one above expressed.

But without pursuing the subject further, I may state it as my opinion, that a pardon by the President, in the case proposed, will have the effect of restoring the officer to his former relative rank, according to the date of his commission.

I am, sir, very respectfully,
Your obedient servant,
WM. M. EVARTS.

The PRESIDENT.

CASE OF THE NATIONAL BANK OF THE METROPOLIS

The Treasurer of the United States cannot retain, as security for a claim due the United States, the bonds deposited with him by a national bank, under section 16 of the act of June 3, 1864, to secure its circulation.

ATTORNEY GENERAL'S OFFICE,
January 28, 1869.

SIR: Your communication of the 14th instant, enclosing a letter from the Treasurer of the United States of a previous date, in which a claim is alleged against the National Bank of the Metropolis for interest upon its average indebtedness to the Government on deposits formerly made with the bank for above two years from the 11th of September, 1866, proposes for my opinion the question whether that officer may retain, as security for such claim, certain bonds which were deposited with him by the bank to secure its circulation?

According to my understanding of the case, these bonds were deposited by the bank with the Treasurer in compliance with the 16th section of the national currency act of June 3, 1864, (13 Stats., 104,) which requires every association, preliminary to the commencement of banking business, and before it shall be authorized to commence business, to "transfer and deliver to the Treasurer of the

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United States any United States registered bonds bearing interest to an amount not less than thirty thousand dollars, nor less than one-third of the capital stock paid in, which bonds shall be deposited with the Treasurer of the United States, and by him safely kept in his office until the same shall be otherwise disposed of, in pursuance of the provisions of this act," etc.; with the proviso that "nothing in this section shall prevent an association that may desire to reduce its capital or close up its business and dissolving its organization from taking up its bonds upon returning to the Comptroller its circulating notes, in the proportion hereinafter named in this act, nor from taking up any excess of bonds beyond one-third of its capital stock, and upon which no circulating notes have been delivered."

Section 19 of the same act declares that "all transfers of United States bonds, which shall be made by any association under the provisions of this act, shall be made to the Treasurer of the United States in trust for the association," etc.

And section 21 provides that "upon the transfer and delivery of bonds to the Treasurer, as provided in the foregoing section, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, etc., equal in amount to the ninety per centum of the current market value of the United States bonds so transferred and delivered, but not exceeding ninety per centum of the amount of said bonds at the par value thereof, if bearing interest at a rate not less than five per centum per annum," etc. Thus far the provisions of this section are unchanged by the amendatory act of March 3, 1865, (13 Stats., 498.)

The bank, having gone into voluntary liquidation, now seeks to take up the bonds in question under the 42d section of the said act of 1864, (13 Stats., 112,) which enacts "that any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." [Here follow directions how notice of the fact shall be certified and publication thereof made, and then it pro-

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ceeds:] "And at any time after the expiration of one year from the time of the publication of such notice as aforesaid, the said association may pay over to the Treasurer of the United States the amount of its outstanding notes in the lawful money of the United States, and take up the bonds which said association has on deposit with the Treasurer for the security of its circulating notes," etc.

It is plain, from the various provisions of the statute above quoted, that the design of the law, in requiring a deposit of bonds to be made with the Treasurer in the manner provided, is especially to secure the circulation of the bank, and that it has no other object than this in contemplation.

Assuming, then, in the consideration of the question presented by you, the validity of the alleged claim, I am still clearly of opinion that upon compliance with the conditions of the last cited section, the bank becomes entitled, by the very terms of the act under which the bonds belonging to it were placed with the Treasurer, to have them delivered up, and that this officer cannot lawfully retain them after the specific purpose for which they were deposited has been subserved, with a view to provide for objects not within the statute, nor contemplated by either party when the deposit was made. This is only the application of a general rule of law respecting special bailments, which has become elementary, and which is thus concisely expressed in a work of authority: "The pledgee cannot retain a pledge for the purpose of securing other debts than those for which it was given, unless that was the intention of the parties." (1 Parsons on Cont., 601, ed. of 1853.)

I return herewith the papers which accompanied your communication.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

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DISMISSAL OF INTERNAL REVENUE SUITS.

The act of July 20, 1868, section 102, does not require that the Attorney General should approve the action of the Commissioner of Internal Revenue, where he directs the unconditional dismissal of a judicial proceeding under the internal revenue laws.

ATTORNEY GENERAL'S OFFICE,
February 6, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of the 28th December last, propounding for my opinion the following question: Can the Commissioner of Internal Revenue direct or suggest the unconditional dismissal of a suit under the internal revenue laws, without the recommendation and approbation of the Attorney General and of the Secretary of the Treasury?

This question is suggested by an observation which occurs at the close of the opinion which I had the honor to render to you on the 28th of November last, upon a ruling of the district judge for the district of Kentucky, in regard to the construction of the 102d section of the act of July 20, 1868, prohibiting a compromise of any internal revenue case after a suit or proceeding in court has been commenced, without the recommendation of the Attorney General.

That observation was to the effect, that it was the intention of Congress, in enacting this provision of law, "to require that, before any suit under the internal revenue laws was disposed of by dismissal, without judicial contestation, the judgments of the three officers mentioned in the statute should concur in favor of the propriety of such action on the part of the executive department."

Upon full consideration, however, of the provision contained in the 102d section of the act of July 20, 1868, I cannot perceive that there is any requirement that the Attorney General should approve the action of the Commissioner of Internal Revenue, where he directs the uncon-

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ditional dismissal of a suit or proceeding pending in court under the internal revenue laws.

In the case from Kentucky, upon which I rendered my former opinion, the dismissal was upon the condition of payment of costs by the claimant and entry of a certificate of probable cause. This arrangement between the Government and the claimant constituted, as there determined, a compromise of the pending proceeding, and was, therefore, within the terms of the statute of 1868. But where it is discovered, after a seizure has been made and a judicial proceeding has been begun, that the seizure and proceeding were unadvisedly made and instituted, and without just grounds for forfeiture, it is competent for the Commissioner of Internal Revenue to direct the discontinuance or dismissal of the same by the district attorney, without the approbation of the Attorney General or the Secretary of the Treasury. Such action is not based upon any consideration proceeding from the owner or claimant of the property to the Government, and is, therefore, not a compromise within the meaning and intent of the act of Congress.

I am, sir, very respectfully,
Your obedient servant,
WM. M. EVARTS.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

ADDITIONAL COMPENSATION ACT.

The clerks and employés in the office of the depot commissary of subsistence at Washington are not entitled to the additional compensation provided by the joint resolution of February 28, 1867.

ATTORNEY GENERAL'S OFFICE,
February 9, 1869.

SIR: I have the honor to state that the President, on the 30th day of January, 1869, referred to the Attorney Gen-

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eral, for an early opinion, a petition in behalf of a number of clerks and employés in the office of the depot commissary of subsistence at Washington, wherein they claim to be entitled to the additional compensation authorized by the 1st section of the joint resolution of February 28, 1867, (14 Stats., 569.)

The question involved is simply whether this law extends to clerks and employés of the depot commissary at Washington, then in the service of the Government.

By reference to the statute, it will be seen that it at first embraces, in general terms, the civil officers, clerks, messengers, watchmen, including enlisted men detailed as such, and employés, male and female, in the executive mansion, and in the various executive departments, or any bureau or division thereof; and then goes on to include the civil officers, clerks, and employés, male or female, in certain offices and bureaus there enumerated, among which the depot commissary is not named.

It is very certain that the clerks and employés of the depot commissary are not within the particular provision last referred to, since this cannot be deemed to extend to other offices or bureaus than those especially designated. So that, if they are at all covered by the law, it must be because they fall under the previous general terms of description comprehending the clerks and employés of any bureau or division of the War Deparment. Unless, then, the depot commissary at Washington may be regarded as a bureau or division of that department, within the meaning of the statute, the clerks and employés thereof are not included in its provisions.

When we speak of a bureau or division of any of the executive departments, we usually mean a branch of the public service charged with some portion of the administrative duties of that department, under the immediate supervision of its chief. This is the ordinary import of those terms, and is, I think, the sense in which they should be applied, as used in the law. Thus considered, the depot commissary at Washington is no more a branch of the

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War Department than the depot commissary at New Orleans or at any other remote point.

The distinction is very well marked in the annual appropriation acts. The compensation of the officers, clerks, messengers, etc., employed in the War Department, and in the different offices and bureaus thereof, is separately provided for out of the appropriation annually made for the legislative, executive, and judicial expenses of the Government; whilst the pay of clerks and employés of commissaries, quartermasters, paymasters, and of other divisions of the military service, is commonly provided for out of the appropriation annually made for the support of the army.

I am of opinion, therefore, that the clerks and employés mentioned are not entitled to the benefit of the act of February 28, 1867.

I am, sir, very respectfully,
Your obedient servant,
WM. M. EVARTS.

The PRESIDENT.

CASE OF CAPTAIN MIMMACK.

A valid resignation of a military officer, followed by an unconditional acceptance of it, operates to remove the incumbent, and a new appointment is required to restore him to the office.

ATTORNEY GENERAL'S OFFICE,
February 10, 1869.

SIR: The facts of the case referred to me in your letter of the 4th ultimo, as collected from the papers transmitted therewith, are as follows:

In May, 1868, certain charges preferred against Captain B. P. Mimmack, of the 30th regiment of infantry, "drunkenness on duty" being among them, were withdrawn, upon condition that he would place his resignation in the hands of General Augur, the department commander, to be for-

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warded to Washington in case he should again become intoxicated. Accordingly, on the 10th of that month Captain Mimmack transmitted to Brevet Brigadier General Potter his resignation, without date, authorizing General Potter to place it in the hands of General Augur, to be forwarded to the War Department should "he ever become intoxicated again."

On the 3d of October, 1868, General Potter reported to General Augur that Captain Mimmack had "again broke out drinking hard," etc., and on the 5th of the same month General Augur forwarded the resignation of Mimmack to the Adjutant General, recommending its acceptance. The resignation was accepted, and took effect on the 29th of October, 1868. But afterwards, on the 11th of December last, this acceptance of the resignation was revoked by the President. In the meantime, it is stated, the place made vacant by the resignation of Captain Mimmack has been filled by the advancement of First Lieutenant A. D. Palmer, who stood next in the line of promotion; but the nomination of Lieutenant Palmer to that office has not yet been confirmed by the Senate.

Upon this state of facts, the following question is submitted for my opinion: Whether the revocation by the President of the acceptance of the resignation of Captain Mimmack had the effect of restoring him to his former position in the military service?

This question, I think, must be answered in the negative. Upon the facts as stated, it is clear that there was a valid resignation and an unconditional acceptance of it, the concurrence of which operated to remove the incumbent from his office in the military service, and nothing short of a new appointment could have the effect of restoring him to that office. Cases, I am aware, have occurred in which a resignation and the acceptance of it by the President or other proper authority were not supposed to have been attended with such consequences. But in those cases it was held there were no valid and efficient resignations, and that the acceptance of the President or other proper

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authority was inoperative, and, therefore, capable of being recalled or withdrawn.

In the case considered by Attorney General Cushing, (6 Opinions, 456,) the officer was insane at the time he resigned, and when the President accepted his resignation. The action of the officer was held to have been a mere nullity, which could not be made valid by its acceptance.

Again in Kavanagh's case, (10 Opinions, 229,) Mr. Attorney General Bates held that an officer who was insane at the time his resignation was tendered and accepted did not lose his office by reason of those acts, and that a reappointment was consequently unnecessary. And in the case of Lieutenant Drane, Mr. Crittenden held, that when the War Department, by mistake, had treated a letter of the officer as a resignation, the error, upon its discovery, was capable of being rectified by the Department. (3 Opinions, 641.)

These cases are peculiar and exceptional. The present case has no feature in common with them. The resignation of Captain Mimmack was voluntary, valid, and sufficient for the purpose intended. It was duly and regularly accepted by the proper authority. The effect which he intended it should have it has had. He is now, and has been ever since its acceptance, out of the service, as completely as if he had never been in it. He can only be restored to it by a new appointment, made conformably to the Constitution.

I return herewith the papers received with your communication.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. J. M. SCHOFIELD,

Secretary of War.

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DISTRIBUTION OF INTERNAL REVENUE FINES.

Statutory rules for the distribution of certain fines recovered under the internal revenue acts of 1864, 1866, and 1867.

ATTORNEY GENERAL'S OFFICE,
February 11, 1869.

SIR: I have considered the question proposed in your letter of the 10th of November last, relating to the right of a collector, deputy collector, or informer, to participate in fines recovered under the internal revenue acts of June 30, 1864, (13 Stats., 223,) July 13, 1866, (14 *ibid.*, 98,) and March 2, 1867, (*ibid.*, 471,) and after a careful examination of the various provisions touching the subject, arrive at the following general conclusions:

1. That by virtue of sections 41 and 179 of the law of June 30, 1864, *all* fines recovered under this act are, in effect, subject to precisely the same disposition as that specially provided in sections 21, 36, and 73 of the same act, for the distribution of the fines thereby imposed, viz: one-half to the United States and the other half to the informer; and that any person, whether in or out of the revenue service, who first informs of the cause, matter, or thing whereby any such fine was incurred, is entitled to share in the distribution. But,

2. That by the act of July 13, 1866, which strikes out entirely the distributing clause in section 41 of the previous statute, and modifies the corresponding provision in section 179 of the same statute, the latter section, as so modified, is thenceforth made to govern the disposition of all fines imposed by the internal revenue laws, *not otherwise provided for;* so that, where any *special* provisions existed for the disposing of fines in particular cases, (as, for example, in sections 21, 36, and 73, of the act of 1864,) these now become the rule of distribution in the cases to which they

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relate, but that, in the absence of such provisions, all fines recovered under the internal revenue laws are to be distributed according to the *general* mode provided by the act of 1866. Finally,

3. That the general rule of distribution established by the act of 1866 was not changed by the act of March 2, 1867; the latter act striking out only the *special* provision which previously existed for distributing fines imposed under section 73 of the law of 1864, leaving these hereafter to come under the operation of the general provision of the act of 1866, already referred to.

These conclusions will sufficiently indicate my views upon the subject of your communication.

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. O. H. BROWNING,
Secretary of the Interior.

ADVERTISEMENTS OF MAIL LETTINGS.

The proprietors of certain newspapers in the District of Columbia are entitled to payment for the publication, without the previous order of the Postmaster General, of those notices of mail lettings which the law *required* him to publish in those papers; but they must show a previous order for the publication of such notices as the Postmaster General was only *authorized* to publish in those papers, before they can claim payment therefor.

ATTORNEY GENERAL'S OFFICE,
March 3, 1869.

SIR: In your letter of the 5th ultimo, you state that between September 25, 1867, and August 18, 1868, the proprietors of the "Morning Chronicle," the "Evening Star," and the "National Republican," daily newspapers printed in the city of Washington, D. C., published in those

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papers the advertisements of mail lettings in a number of States and Territories of the United States without a previous order from the Postmaster General, for which advertising they claim payment from the Government, and in connection with these facts you propose for my opinion the following questions:

"1. Had the proprietors of these papers a right, under existing laws, to publish advertisements of this character without a previous order authorizing it from the Postmaster General?

"2. Is the Postmaster General authorized by any law to pay for these publications when thus made?"

During the period referred to, the publication by the Post Office Department, in the District of Columbia, of advertisements of mail lettings, or proposals for carrying the mails, was regulated by the 10th section of the act of March 2, 1867, (14 Stats., 467) and the 2d and 4th sections of the act of July 20, 1868. (Laws of 40th Congress, 2d Sess., 110.)

Under the act of 1867 it was the duty of the head of that department to give publicity to all such advertisements, without reference to the locality where the mail contract was to be performed, in the two daily papers published in the District of Columbia there designated, which are understood to be the two journals first above mentioned.

The 2d section of the act of 1868 extended the provisions of the former act to one additional newspaper in the District, to be selected by the Clerk of the House of Representatives from the date of the approval of that act, and it is understood that the last-named paper was the one selected in accordance with this statute.

The 4th section of the same act declares, that advertisements relating to the District of Columbia, Maryland, and Virginia, shall be published in the three papers to which reference has already been made; but no advertisement relating to any other State, District, or Territory, is to be

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published therein, unless at the direction of the proper head of a department.

The effect of the latter provision was to modify so much of the previous law as made it the duty of the Postmaster General to publish all advertisements of the character referred to, irrespective of locality, in the District of Columbia papers, and to leave their publication in such papers discretionary with him, except those notices which concern the District itself and the two States named in conjunction therewith. Advertisements of the latter description were, as before, required to be published in the District; while the expediency of publishing any others there was to be determined by the head of the department himself, who was not, however, at liberty to select for the purpose a different advertising medium than that prescribed.

Thus it appears that, from the date of the act of 1867 down to the period when the act of 1868 went into operation, the Postmaster General was required by law to publish in the aforesaid papers all advertisements of his department of the kind mentioned, and since the date of the latter act all those which relate to the District of Columbia, Maryland, and Virginia; but that similar advertisements, relating to any other State, District, or Territory, though authorized, were not required to be published by him subsequent to the act of 1868.

I accordingly arrive at the following conclusions upon the subject presented: Respecting such notices as the Postmaster General was required, under the statutes cited, to publish in the above-named papers during the period mentioned, the authorization of their publication therein, without a previous order from the department, may well be implied from neglect on his part to interfere with the publication, and I perceive no reason why the advertising should not be paid for, if there is any appropriation applicable to it. But with regard to the other notices, which, as above remarked, he is simply authorized to publish without being required to do so, an order received previous to their publication must be shown by the District

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publisher before he can claim payment therefor; the law expressly declaring that these shall not be published in the papers of the District unless at the direction first made of the head of the department. (See 4th sec. Act of 1868.)

I am, sir, very respectfully,

Your obedient servant,

WM. M. EVARTS.

Hon. A. W. RANDALL,
Postmaster General.

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5. Although there has been conflict of opinion on the question of the authority of a State court to discharge a person held under color of authority of the United States, there has not been any serious conflict of opinion as to the jurisdiction of a State court to require a return to its writ of *habeas corpus* in such a case and the production of the body. *Ibid.*
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9. A former rebel soldier was arrested in September, 1867, by the military authorities, for an assault in Tennessee upon a private citizen, with a view of putting him on trial by a military commission for violation of his parole given on May 1, 1865. He subsequently sued out a writ of *habeas corpus* before the district judge, who, on full hearing before himself alone, the circuit judge not being present, discharged the prisoner. *Held*, that under the existing statute there was no mode by which the case could be taken by appeal to the Supreme Court of the United States, 332.

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5. The provision for a responsible party is not inconsistent with the provision for a sale for cash. *Ibid.*
6. The contract made by the Secretary of the Interior for the sale of the Cherokee neutral lands to the American Emigrant Company not being in comformity with the power of sale vested in him by the treaty with the Cherokee nation, ratified on the 31st of July, 1866, the department

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INDIANS AND INDIAN LANDS (*continued.*)
is advised to notify the company that it declines to carry the same into execution. *Ibid.*
7. The moneys payable by the bonds and coupons issued by the Leavenworth, Pawnee, and Western Railroad Company, in favor of the Delaware tribe of Indians, pursuant to the treaty ratified by the President on the 4th of October, 1861, may be lawfully paid in legal-tender notes, 84.
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3. Cotton belonging to a Choctaw Indian, produced by him in the territory of his nation and found beyond its limits, is not subject to the internal revenue tax, 132.
4. The term "person," as used in the 9th section of the internal revenue act of July 13, 1866, and as explained in the 44th section of that act, does not include a State, 176.
5. The certificates or receipts issued by the State of Alabama, under authority of the act of its Legislature of February 19, 1867, are not subject to the tax of ten per cent. imposed by the act of Congress of March 25, 1867. *Ibid.*
6. The internal revenue system of the United States has not, in any instance or for any purpose, been extended over the Indian country, 208.
7. Cotton raised in the Choctaw nation, by an Indian of that nation, is not liable to taxation, under the internal revenue law, either while in the Indian country or in transit through any collection district, or in the collection district where it may have been found, or may have been sold. *Ibid.*
8. Railroads owned exclusively by a State, and operated by its own agents, do not fall within the provisions of the internal revenue act of June 30, 1864, 277.
9. Articles manufactured by convict labor in the penitentiaries of a State,

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INTERNAL REVENUE LAWS (*continued.*)
for the use or on account of the State, are not subject to taxation under the internal revenue laws. *Ibid.*

10. This institution is within the principles of the opinion of Attorney General Stanbery, of October 14, 1868, which declares, that articles manufactured by convict labor in the penitentiaries of a State, for the use of the State, are exempt from taxation under the internal revenue laws, 376.
11. A national bank is not liable under the internal revenue laws to the tax of five per centum upon the dividends due a State on stock owned by the State, 402.
12. The course of proceeding to be observed in execution of the 102d section of the act of July 20, 1868, relative to the compromise of suits under the internal revenue laws, considered and indicated, 472.
13. Distillers of brandy from apples, peaches, and grapes, exclusively, may be exempted, in the discretion of the Commissioner of Internal Revenue and the Secretary of the Interior, from the provision of the 59th section of the act of July 20, 1865, levying a special tax of four dollars a barrel upon distilled spirits, 514.
14. The general purpose of the internal revenue law of July 20, 1868, so far as relates to distilled spirits, is to lay a tax upon the product of distillation known as proof-spirits, 523.
15. The act has made decisive and peremptory distinctions between the production of proof-spirits and the rectification or purification or the production of other forms of alcoholic compounds. *Ibid.*
16. Any contrivance which should accomplish the production of alcohol or rectified spirits in a manner to subject such products to a single tax, as upon proof-spirits, would be presumptively in contravention of the law. *Ibid.*
17. A true construction of the act of Congress does not require any distinction to be drawn between an arrangement of *stills*, by which the process of "*doubling*" is carried on, by passing the low-wines a *second* time through the *same* still, and passing these a second time through distillation in *another* still. *Ibid.*
18. An arrangement by which a *tank* is interposed as a receptacle for the product of distillation, so far as the same has not reached the condition of proof-spirits, but still continues to be low-wines, with a view to carry it back for further distillation, is not a violation of the act. *Ibid.*
19. Where a suit under the internal revenue laws is agreed to be dismissed upon payment of costs by the claimant, and entry of certificate of probable cause of seizure, the same is an agreement for a compromise of the case, and cannot take effect without the approval of the Commissioner of Internal Revenue, the Secretary of the Treasury, and the Attorney General, 536.
20. The act of July 20, 1868, section 102, does not require that the Attorney General should approve the action of the Commissioner of Internal Revenue where he directs the unconditional dismissal of a judicial proceeding under the internal revenue laws, 552.

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INTERNAL REVENUE LAWS (*continued.*)

21. Statutory rules for the distribution of certain fines recovered under the internal revenue acts of 1864, 1866, and 1867, 558.

INTERNATIONAL LAW.

1. The rule of international law is well established, that a foreigner who resides in the country of a belligerent can claim no indemnity for losses of property occasioned by acts of war of the other belligerent, 21.
2. American merchants domiciled for commercial purposes at Valparaiso connot sustain a claim for indemnity against Spain or Chilé for losses of merchandize in the conflagration caused by the bombardment of Valparaiso by the Spanish fleet in March, 1866. *Ibid.*

INSPECTORS OF HULLS AND BOILERS.

A designation by a majority of the board constituted under the act of August 30, 1852, of inspectors of hulls and boilers, and an approval of the designation by the Secretary of the Treasury, constitutes the parties incumbents of those offices, 392.

LAND LAWS.

1. The act of July 1, 1864, does not apply to surveys which had become final by lapse of time or approval of the district court before that act went into operation, 116.
2. A patent should be issued upon a survey which became final and conclusive before the passage of the act of July 1, 1864. *Ibid.*
3. A patent may be issued for land which has been surveyed and the survey of which has been acted upon by the district court, before the time limited by the act of July 23, 1866, for appeal to the circuit court, if all the parties of record in the case in the district court expressly waive, by agreement of record, their right of appeal, 121.
4. Where a survey and plat of a confirmed California land claim were made by the surveyor general, and notice of the same, with his approval, was given by publication, conformably to the act of June 14, 1860, but the surveyor general failed to transmit the survey and plat to the General Land Office until after the passage of the act of July 1, 1864, repealing the act of June 14, 1860, it was held, that it was the duty of the Commissioner to issue a patent according to the survey and plat transmitted to him by the surveyor general of California, 250.
5. No steps having been taken to invoke the jurisdiction of the district court the title to the land covered by the survey and plat vested absolutely in the claimant, and the repeal of the statute, after the title so vested, cannot be construed to have divested that title. *Ibid.*
6. A title vested by statute is just as complete as one vested by the issuance of a patent, and where the title is vested prior to a patent, the only office of the patent is to afford the party more convenient evidence in establishing his right when brought in contest, 251.
7. The authority to issue a patent for confirmed grants in California, after the repeal of the act of June 14, 1860, is given by the 13th section of the act of March 3, 1851. *Ibid.*
8. The Secretary of the Interior has supervisory power over the acts of the

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LAND LAWS (*continued.*)

Commissioner of the General Land Office in the matter of granting or refusing a patent on a California land claim, or any action of the Commissioner approving or disapproving of the survey. *Ibid.*

9. Where the President, in 1854, directed that a tract of land in California be reserved for light-house purposes, and there was a subsequent judicial confirmation of a claim to this tract, under a grant from Mexico, and the United States, in 1860, issued a patent to the grantee in pursuance of this confirmation, which patent did not mention the fact of the existence of this reservation, it was *held*, that the patentees were entitled to the possession of the land as against the United States, 379.

MAILS.

The contract intended to be authorized by the act of July 27, 1868, with the Commercial Navigation Company of New York, is for the exclusive transportation of all the European and foreign mails of the United States by it, in weekly or semi-weekly lines, and between either New York and Bremen, or between New York and Liverpool, as might be agreed, excluding all such transportation by other lines or upon more frequent days, 511.

MILITARY COMMISSIONS.

1. A military commission sitting in Washington during the war had no jurisdiction to try a citizen of the United States, not in the military service, for a criminal offence committed in New York, 128.
2. Any moneys or effects taken by an officer or agent of the United States from a citizen so tried and convicted, in execution of the sentence of such a commission, imposing a fine upon the prisoner, may be restored to him, if they are within the control of the executive department of the Government. *Ibid.*

NATIONAL CURRENCY ACT.

The Treasurer of the United States cannot retain, as security for a claim due the United States, the bonds deposited with him by a national bank, under section 16 of the act of June 3, 1864, to secure its circulation, 549.

NAVY AND NAVAL LAWS.

1. The pay of the vice admiral of the navy, while acting superintendent of the naval school, is at the rate allowed him for services at sea by the act of December 21, 1864, 81.
2. Section 20 of the act of July 16, 1862, fixing the pay of retired naval officers, does not repeal the previous laws authorising promotion on the retired list, 138.
3. The pay of retired officers of the navy is regulated in all cases by the provisions of the 20th section of the act of July 16, 1862. *Ibid.*
4. The construction of the 20th section of the act of July 16, 1862, adopted by the Attorney General in his opinion of May 18, 1867, upon this subject, (*supra*, p. 138,) defended, 222.
5. The acceptance of a promotion is not necessary to consummate the appointment of an officer in the naval service to a higher grade, 229.

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NAVY AND NAVAL LAWS (*continued.*)

6 The previous opinions on this subject, of May 18, 1867, and August 1, 1868, (*supra*, pp. 138, 222,) reconsidered and reaffirmed, 296.

7. The President has power to review the action and finding of a board of naval surgeons constituted under the 4th section of the act of April 21, 1864, 347.

8. The act of June 1, 1860, to regulate the pay of the navy, does not repeal the act of March 3, 1853, providing specially for the pay of a purser doing duty at the naval station of California, 417.

NEUTRALITY.

There is no law authorizing the Secretary of State to furnish the owners of this vessel with a letter of safe-conduct to the American ministers and naval officers in the East, 65.

NEUTRALITY LAWS.

1. Upon the facts of this case, it appears that this vessel was permaturely and without probable cause libelled for violation of the neutrality laws, and she should be released on the owners' giving the bond required by the 9th section of the act of April 20, 1818, 113.

2. Upon the representations of the Spanish minister in reference to this vessel, the Attorney General finds it unnecessary to advise any action in addition to that heretofore taken in regard to her, pursuant to his previous opinion on the subject, 118.

NEW ORLEANS MINT.

1. A sale or abandonment of the property would cause the same to revert to the grantor, 389.

2. Any disposition or removal of the structures now on the land, inconsistent with the purposes of a branch mint on the site, would enable the grantors to avoid, by judicial proceedings, the right of the United States to the use and occupation of the premises. *Ibid.*

OATH OF OFFICE.

Clerks in the executive departments are officers, and are required to take the oath prescribed by the act of July 2, 1862, 521.

PACIFIC RAILROAD.

1. Duty of the President in reference to the Government subsidy for the Pacific railroad, 470.

2. The responsibility and duty imposed upon the President by law, in respect of the acceptance or approval of the structure and equipment of successive sections of the Pacific railroad, preparatory to the issue of the Government subsidies thereon, considered and defined, 477.

PARDON.

The effect and operation of a pardon issued by the President stated, 81.

PARIS EXPOSITION.

The Secretary of State has authority, under the joint resolution of July 5, 1866, to pay the moneys appropriated for the Paris exposition, to be expended in Europe, in coin, 9.

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PAROL.

The cessation of war and the peace proclamation of the President relieve a rebel officer from his parol and from military jurisdiction, 120.

PORTUGUESE MISSION.

It was not the intention of Congress, by the act of February 28, 1867, to put an end to the Portuguese mission, but simply to prohibit the payment of the salary for personal services of the minister, 275.

POSTAL LAWS.

1. Where a letter is sent through the post office to one person in care of another, it is the duty of the postmaster to deliver the letter to the former, if requested by him, 136.
2. The postmaster has no authority in such a case to deliver the letter to the sheriff upon an attachment levied at the suit of creditors of the person to whom the letter is addressed. *Ibid.*
3. Where parties are engaged in practicing gross fraud upon the public, through the agency of the mails, it is competent for the Postmaster General to adopt measures and issue instructions to the end of preventing the postal service from being made a means for the accomplishment of the unlawful purpose, 399.
4. The statute of July 27, 1868, prohibiting the mailing of letters or circulars concerning lotteries, cannot be safely executed by postmasters in all cases without additional legislation, 538.
5. The proprietors of certain newspapers in the District of Columbia are entitled to payment for the publication, without the previous order of the Postmaster General, of those notices of mail lettings which the law *required* him to publish in those papers; but they must show a previous order for the publication of such notices as the Postmaster General was only *authorized* to publish in those papers, before they can claim payment therefor, 559.

PUBLICATION OF THE LAWS.

1. The publication of the laws and resolutions of Congress is not provided for in the 6th section of the act of May 18, 1866, 100.
2. There is no regulation of law for the publication of laws, treaties, and resolutions in the city of Washington, but such publication may be made at any place within the limits of the District of Columbia. *Ibid.*

REBELLION.

1. The State of Arkansas, on the 11th of May, 1864, was in a condition of insurrection against the United States; and an act of Assembly of the State, passed on that day, was not a valid acceptance by the Legislature of the State of the act of Congress of July 2, 1862, known as the agricultural college grant, 11.
2. Bonds of the United States issued in 1842, and held at and before the commencement of the rebellion by a citizen of Virginia, who never took any active part in the rebellion, and whose property is not liable to seizure under the confiscation acts, are, in the year 1866, valid obligations of the United States in the hands of the holder, and may be lawfully paid to him, 19.

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REBELLION (*continued.*)

3. There is no impediment in the present condition of Virginia to prevent the full exercise of the jurisdiction of the civil courts in the case of this prisoner, 69.
4. The joint resolution of March 2, 1867, prohibiting payment to any person not known to have been opposed to the rebellion, does not affect the payment of certificates of funded stock issued under the act of October 13, 1848, 407.

REMOVAL OF SUITS.

The right of removal, given by the 3d and 4th sections of the act of May 11, 1866, attaches upon the filing of the petition, verified by affidavit, according to the 5th section of the act of March 3, 1863, without giving security for filing copies of the papers in the circuit court, and without giving security for the appearance of the defendant in that court, 109.

RECONSTRUCTION ACTS.

1. The question arising upon the act of March 2, 1867, "to provide for the more efficient government of the rebel States," and the supplementary act of March 23, 1867, submitted by the commanders of the military districts of the South to the President for his instructions, considered and determined by the Attorney General, 141.
2. The duties and powers of the boards of registration, constituted by the act of March 23, 1867, considered. *Ibid.*
3. The powers and duties of the military commanders, in the districts constituted by the act of March 2, 1867, "to provide for the more efficient government of the rebel States," considered and determined, 182.
4. The jurisdiction of military commissions under that act defined. *Ibid.*
5. Summary of the points considered and determined in the former opinion of the Attorney General on this subject. *Ibid.*

REMISSION.

The judgment against the employés of this company may be released by remissions of the Secretary of the Treasury under the act of 1797, 103.

ROCK-ISLAND BRIDGE.

The act of March 2, 1867, making appropriation for the construction of a bridge at Rock Island, requires that the Rock Island and Pacific Railroad Company shall agree to pay, and shall secure the payment of, half the cost of the erection of the projected bridge over the west or main channel, and half the expense of keeping the same in repair. The other portions of the work, viz, the construction of a new track across the island, and the building of a bridge, if necessary, over the east channel of the river, are left subject to further legislative provision, 231.

SALVAGE.

1. The general English doctrine is, that salvage is not due to a national vessel for service performed in recapturing from the enemy another vessel employed in the public service, 289.
2. The statutes of the United States make no distinction between the re-

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SALVAGE (*continued.*)

capture by a public armed vessel of the United States and recapture by a private vessel of the United States; and, in case of the recapture of a public vessel by another public vessel, the salvage, costs, and expenses are payable from the Treasury. *Ibid.*

SAN FRANCISCO CUSTOM-HOUSE.

1. A sale or abandonment of this property by the United States would work a forfeiture under the grant from the State, 373.
2. Though the United States have the right to remove the buildings erected on the premises, yet they are obliged to maintain a fit and suitable custom-house thereon. *Ibid.*
3. The Government by the terms of the grant has no power to lease the property, except for the purpose of carrying out the object of the grant. *Ibid.*

STATUTES.

1. Where one statute is repealed by another statute, acts done in the meantime, while it was in force, endure and stand, and are good and effectual, 251.
2. On every act professing to repeal or interfere with the provisions of a former law, it is a question of construction whether it operates as a total or partial repeal. *Ibid.*

SURVEYOR OF CUSTOMS.

Neither surveyors, not discharging the duties of collectors, nor naval officers are entitled to extra compensation under the act of March 3, 1841, to be computed upon fees, emoluments, or storage, not actually received and accounted for by them, and to which fees, emoluments, or storage they are not legally entitled, 386.

TELEGRAPHS.

1. The legislation of Congress, on the subject of interoceanic telegraph communication, declares it to be a subject-matter of national concern and commercial intercourse, 337.
2. An interoceanic telegraph cable, which has its terminus upon the territory of the United States, comes within the regulating power of Congress. *Ibid.*
3. It is doubtful whether Congress has power over the subject-matter of intercourse by telegraph strictly within the limits of a State, or extending through two or more States, having its termini within the territory of the United States. *Ibid.*
4. It seems that Congress has not the power to regulate the charges upon a railroad; and, for the same reason, it cannot have that power over telegraphic communication within the limits of the United States. *Ibid.*
5. As to foreign commerce, a State has no regulating power, as it is altogether and exclusively a matter of federal legislation; and the telegraph, when used as a vehicle of intercourse with foreign nations, has been claimed by Congress to be within the power to regulate commerce. *Ibid.*

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TELEGRAPHS (*continued.*)

6. Congress may prescribe the rules upon which oceanic telegraphs, connecting the United States with foreign countries, shall be operated, and fix for them a tariff of charges. *Ibid.*

TENURE-OF-OFFICE ACT.

1. Where a person was appointed deputy postmaster, under a temporary commission issued on October 26, 1866, and he was afterwards rejected by the Senate, before the passage of the tenure-of-office act of March 2, 1867, and no confirmation was had of a successor until March 2, 1867, who took possession of the office on April 14, 1867, it was *held*, that he was entitled, under the tenure-of-office act, to compensation for the whole of that period and to the time when his successor took charge of the office, 307.
2. The "tenure-of-civil-office act" impresses upon a class of civil officers a tenure at the will of the office-holder, which cannot be terminated except by the concurrence of the President and the Senate in the appointment of a successor, and his actual induction in the office, 443.
3. The purpose of that act was to change the doctrine and practice of the Government, by which removal from office was effected at the mere discretion of the President. *Ibid.*
4. The only interruption of the personal right of the officer against his will, possible under the act, is the general powers of impeachment and judgment thereon, or the special proceedings of suspension, accusation, and judgment thereon, provided by the act, which partake of the nature of impeachment, 443.
5. Where an officer, within the "tenure-of-civil-office act," tenders in writing to the President the resignation of his office, "to take effect upon the qualification of my (his) successor, nominated by yourself (the President) and confirmed by the Senate," his tenure of the office can be regarded as relinquished only upon and after the event which is named in his communication, 444.
6. Such a communication has no official or legal force whatever, in placing at the discretion or disposition of the President any power over the office which he did not possess without it. *Ibid.*
7. An endorsement upon such a communication by the President, declaring his acceptance of "the resignation," has no operation upon the position of the office, as respects its vacancy, or the President's present authority to fill it. *Ibid.*
8. Where a person holding the office of collector of customs resigned during a session of the Senate, and was sworn in and took his seat as a member of the Senate of the United States, it was *held*, that the office of collector became vacant, although his resignation had not been previously accepted, 449.
9. The predicament of vacancy, which may be filled by a temporary appointment by the President, under the Constitution, is not confined by it to vacancies originating or beginning to exist during the recess of the Senate, but embraces "all vacancies that, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them." *Ibid.*

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TENURE-OF-OFFICE ACT (*continued.*)

10. It is to be presumed that Congress, in enacting the 3d section of the "tenure-of-civil-office act," accepted the words of the Constitution therein employed in the same sense in which they had been accepted and acted upon by the executive branch of the Government. *Ibid.*
11. The predicament of "abeyance," in its application to an office made vacant by resignation during a session of the Senate, and not filled at the expiration of that session by a full appointment, by and with the advice and consent of the Senate, can only arise by the expiration of the *next* session of the Senate, without that body's having concurred in a full appointment to the office. *Ibid.*
12. The case of an original vacancy is not affected by the "tenure-of-civil-office act" of March 2, 1867, 455.
13. Where an office is created by a law taking effect during a session of the Senate, and no nominations are made thereto, the office may be filled by executive appointment during the recess of the Senate. *Ibid.*
14. The opinion of Mr. Attorney General Mason in the case of the federal offices in Florida and Iowa (4 Opinions, 363) doubted. *Ibid.*
15. The office of minister to Venezuela passed into "abeyance," under the 3d section of the act of March 2, 1868, by the adjournment of the Senate, on July 27, 1868, without having acted on the nomination of Mr. Stilwell thereto, made to that body on January 28, 1868, 457.
16. Whether an office subsists and is vacant, or the office itself is abrogated while the predicament of "abeyance" continues, is a question of verbal rather than of substantial distinctions. *Ibid.*
17. It is necessary for the President to execute a formal act of removal in the case of an officer within the "tenure-of-civil-office act," sentenced to the penitentiary for crime, in pursuance of a resolution of the Senate advising and consenting to his removal, 468.
18. The "tenure-of-civil-office act" does not prolong the term of any office beyond that limited by law, 469.
19. Where the office of district attorney became vacant by expiration of the statutory term during a session of the Senate, and the Senate adjourned without taking any action on the nomination made by the President to the office, it was *held*, that the President had power, after the adjournment of the Senate, to grant a commission to fill the vacancy, to expire at the end of the next session of the Senate. *Ibid.*

TERRITORIES.

Removal of Governor Ballard, of Idaho, 227.

TERRITORIAL OFFICES.

1. The term of the secretary of the Territory of New Mexico is limited to four years, and after its expiration the incumbent of the office has no right to exercise its functions, 130.
2. The appointment of a person to that office and delivery to him of the commission operate as a removal of the incumbent. *Ibid.*

TEXAS INDEMNITY BONDS.

1. On the 24th of June, 1862, Messrs. Peabody & Co., of London, pur-

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TEXAS INDEMNITY BONDS (*continued.*)

chased in England, for full value, of a regular broker, accustomed to deal in American securities, a number of the bonds issued to the State of Texas by the United States under the act of September 9, 1850. These bonds had been turned over by the rebel authorities of Texas to the military board, so called; had been placed by that board in the hands of an agent for sale in Europe, for the purpose of raising supplies for the rebel forces; and had been placed by said agent in the hands of a broker in London, of whom they were purchased by Messrs. Peabody & Co., without notice of the actual ownership of the bonds or of any fact to excite suspicion of their invalidity. *Held*, that the said bonds were existing valid obligations against the United States in the hands of the purchasers, 72.

2. The twenty-five Texas indemnity bonds held by Messrs. R. & D. G. Mills, of Galveston, are valid obligations in their hands against the United States, upon the principles stated in the opinion in the case of Messrs. Peabody & Co., of London, 78

TREATIES.

1. It seems that there is no existing treaty stipulation between the United States and the Netherlanders, on the subject of the rights by inheritance of children of a deceased child of a Netherlander dying intestate in the United State, 5.
2. In this absence of treaty stipulation, the subject-matter is regulated by the laws of the respective States, and they, as a general rule, recognize the children of a deceased child as entitled to represent their deceased parent in the share which he would have taken from the intestate if such deceased parent had survived the intestate, the descent being *per stirpes*, and not *per capita*. *Ibid.*

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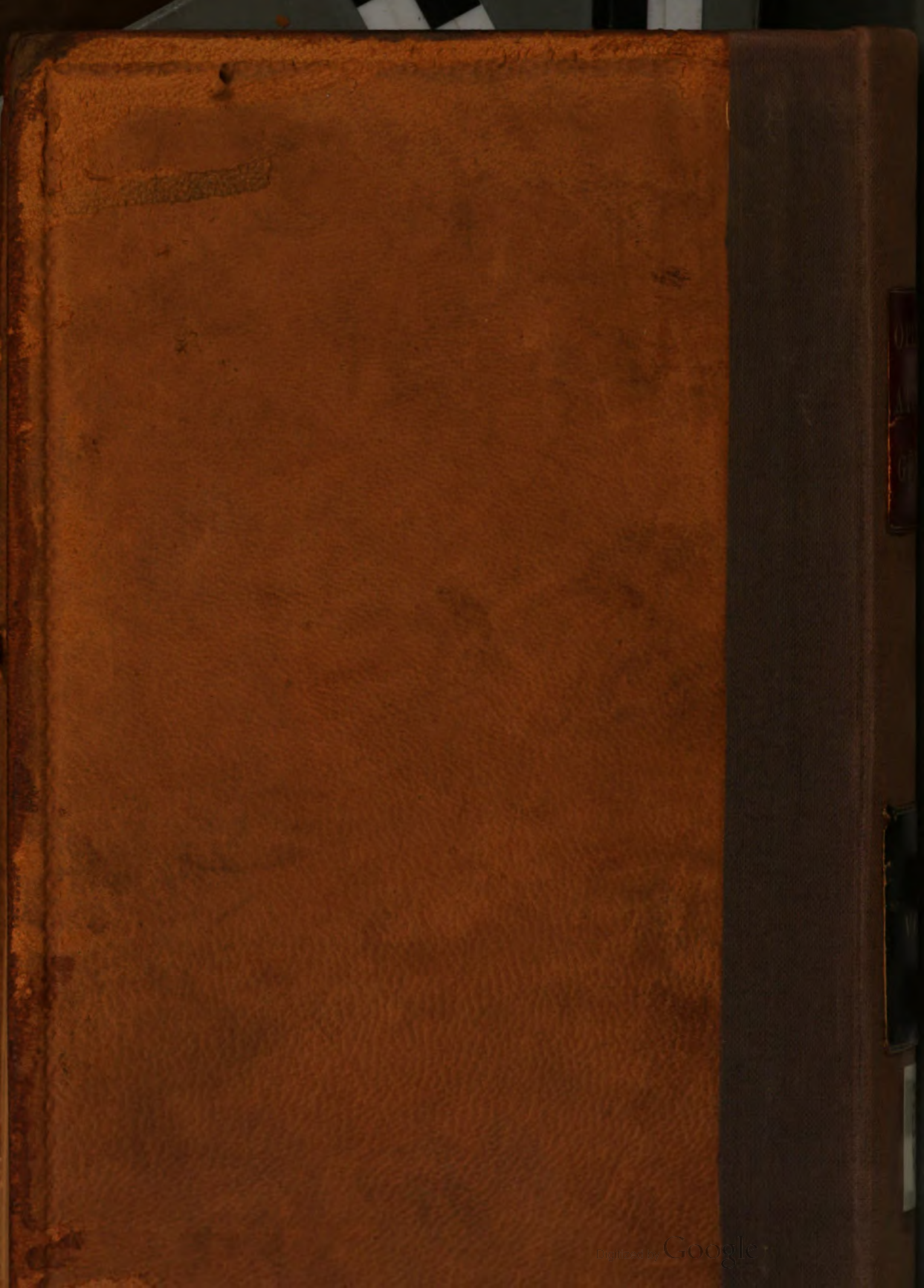
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